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IN THE

Supreme Court of the United States

October Term, 1973

No. .....

PAUL C. MOYNAHAN,

Petitioner,

—v.—

STATE OF CONNECTICUT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

The petitioner Paul C. Moynahan respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Connecticut entered in this proceeding on April 24, 1973 and amended on May 23, 1973.

I. Citation

A decision of the Connecticut Supreme Court, *State* v. *Paul Moynahan,* Volume XXXIV, No. 43, Conn. L.J., p. 1 (April 24, 1973) (a copy of which is annexed hereto) which decision was amended after a motion for reargument (a copy of which amendment is annexed hereto). Said decision as amended is reported as *State* v. *Moynahan,* — Conn., —, — A.2d — (1973).

II. Jurisdictional Grounds

On April 24, 1973 the Connecticut Supreme Court entered judgment affirming the conviction of Paul Moynahan for the crime of receiving stolen goods. Thereafter on April 30, 1973 in accordance with the Connecticut Rules of Practice, Connecticut Practice Book of 1963, Sections 702 to 704, a motion to reargue was filed which motion was denied on May 23, 1973, except to the extent that the court's decision was amended (as annexed). The jurisdiction of this court is invoked under the authority of 28 U.S.C.A. § 1257(3).

III. Questions Sought to be Reviewed

1. Is a defendant's right of confrontation as guaranteed by the Sixth and Fourteenth Amendments denied when the trial court and prosecutor in a jury trial refuse to grant the defendant's request that a prosecution witness be examined in the jury's absence as to his intention to invoke the Fifth Amendment and thereafter permit repeated invocations of the Fifth Amendment by that witness in the jury's presence?

2. Is a defendant denied his right to a full and fair trial by the trial court's ruling that no evidence may be introduced either by cross-examination or through collateral attack to show the bias, interest or motive of a prosecution witness as to his involvement in the criminal charges under consideration on the ground that such evidence may not be introduced if the witness is not under arrest for such charges?

3. Does the Connecticut rule of evidence that the Best Evidence Rule does not apply to an admittedly verbatim written transcription of the statement of an accused to the police thus permitting the interrogating officer to give con-

tradictory testimony as to his recollection of the contents of that statement violate the defendant's right of confrontation, right to the effective assistance of counsel and right to a full and fair trial?

4. Does the Connecticut rule, which conflicts with holdings in Arizona, California, Idaho, Iowa, Kentucky, Louisiana, Mississippi, Missouri, Nevada, Oklahoma, South Carolina and Texas that, notwithstanding the presumption of innocence, it is proper for the court to charge the jury that a criminal accused's testimony is to be weighed in light of his interest in the outcome of the case, a rule which offends that presumption of innocence and violates the accused's basic right to a fair trial?

5. Is an accused denied his right to a full and fair trial when the prosecution, after being ordered prior to trial to reveal all exculpatory evidence including contradictory and inconsistent statements of government witnesses, withholds statements of proposed prosecution witnesses which it knows to be inconsistent with their proposed testimony and contradictory not only with that proposed testimony but also with the proposed testimony of other prosecution witnesses?

6. Does the Connecticut rule which provides that the prosecutor has the sole right to determine what exculpatory evidence shall be turned over to the defense and that the court has no duty to make any *in-camera* inspection to determine compliance offend the accused's basic right to a full and fair hearing?

7. Is the Connecticut one-man grand jury statute, 54 Conn. Gen. Stat. § 47, which permits the Superior Court to appoint a judge, to conduct a hearing, attended by the prosecuting attorney and investigating police officer, the former of whom participates in questioning witnesses, to

inquire into the possible commission of crimes by individuals and to make a public report of its findings, offend minimal due process requirements by virtue of its rule precluding the potential accused from having counsel present, from confronting or cross-examining witnesses and from offering testimony on his own behalf?

8. Is the Connecticut practice, as opposed to the practice in the federal system and in the other forty-nine states, which provides that all prosecutors shall be appointed by the judges of those courts wherein that prosecutor will practice, repugnant to basic concepts of due process?

IV. Constitutional and Statutory Provisions

The defendant relies upon the following provisions of the United States Constitution:

a. With respect to Questions Sought To Be Reviewed, Nos. 1, 2, 5 and 6.

"Amendment VI: In all criminal prosecutions, the accused shall enjoy the right . . .; to be confronted with the witnesses against him; . . . ." Constitution Amendments 6 to 12, U.S.C.A. p. 4 (1972 Edition), and

"Amendment XIV, Section 1: . . .; nor shall any State deprive any person of life, liberty, or property, without due process of law; . . . ." Constitution, Amendments 13 to 14, U.S.C.A. p. 33 (1972 Edition).

b. With respect to Questions Sought To Be Reviewed, No. 3.

"Amendment V: No person . . . shall be compelled in any criminal case to be a witness against himself, ..." Constitution, Amendment 5 U.S.C.A. p. 4 (1972 Edition), and

"Amendment VI: In all criminal prosecutions, the accused shall enjoy the right . . .; to be confronted with the witnesses against him; . . ., and to have the Assistance of Counsel for his defense." Constitution, Amendment 6, U.S.C.A. p. 4 (1972 Edition).

"Amendment XIV, Section 1: . . .; nor shall any State deprive any person of life, liberty or property, without due process of law . . . ." Constitution, Amendments 13 to 14, U.S.C.A. p. 33 (1972 Edition).

c. With respect to Questions Sought To Be Reviewed, Nos. 4 and 8.

"Amendment XIV, Section 1: . . .; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." Constitution, Amendments 13 to 14, U.S.C.A. p. 33 (1972 Edition).

Also with respect to Questions Sought To Be Reviewed, No. 8, 51 Conn. Gen. Stat. § 175.

"Sec. 51-175. State's attorneys; assistants; practice of criminal law by assistants and superior court clerks. The judges of the superior court shall appoint a state's attorney for each county, who shall act therein as attorney in behalf of the state, a state's attorney at Waterbury, who shall have the same powers and perform the same duties within the judicial district of Waterbury in New Haven county and at all criminal terms of the superior court at Waterbury as the state's attorneys in the several counties, and as many assistant state's attorneys for said counties as the criminal business of the court may require, who, respectively, shall assist the state's attorneys for said counties and for said district in all criminal matters and, in the absence

from the county or district or disability of the state's attorney or at his request, shall have and exercise all the powers and perform all the duties of state's attorney. Each state's attorney appointed to such position after July 1, 1967, shall devote his full time to the duties of his office, shall not engage in the practice of law and shall not be a partner, member or associate of a law firm. They shall receive annual salaries as follows: Twenty-four thousand dollars for the counties of Fairfield, Hartford, New Haven and New London and twenty-two thousand dollars for the counties of Litchfield, Middlesex, Tolland and Windham, and for the state's attorney at Waterbury. The provisions of this section with respect to each state's attorney devoting full time to the duties of his office and not engaging in the practice of law or being a partner, member or associate of a law firm, shall not apply to any incumbent state's attorney for the term of his appointment or reappointment to any new term or terms, at the election of each such state's attorney. Each such state's attorney who so elects shall have his annual salary reduced by five thousand dollars. Each such state's attorney may terminate such election at any time. The comptroller shall deduct from such salaries five per cent thereof as contributions for the purposes of sections 51-49, 51-175a and 51-175b. No assistant state's attorney and no partner or associate of a law firm of which such attorney is a partner or associate and no clerk or assistant clerk of the superior court shall engage in the private practice of criminal law before the superior court for the county in which such attorney or clerk is engaged. The several state's attorneys and assistant state's attorneys shall hold office for two years unless sooner removed by said judges. If any state's attorney or assistant state's attorney neglects to annually ac-

count for and pay over all moneys of the state received by him, his office shall become vacant; and the chief justice of the supreme court or the chief court administrator, on a certificate from the comptroller of such neglect, shall appoint another attorney or assistant attorney in his place, who shall hold office until the next annual meeting of the judges unless sooner removed by them. Said judges may remove any such attorney or assistant attorney from office and may fill any vacancy caused thereby, and they may fill any vacancy in either of said offices which may occur from any other cause. Any judge holding the superior court in any county in which any such vacancy exists may fill it until the next annual meeting of the judges, unless it is sooner filled by the judges at a special meeting. (1949 Rev., S. 7664; June, 1955, S. 3118d; 1963 P.A. 378; February, 1965, P.A. 464; 1967, P.A. 622, S. 1.)" General Statutes of Connecticut, Vol. IX, p. 57 (Revised to 1968).

d. With respect to Questions Sought To Be Reviewed, No. 7.

"Amendment VI: In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense." Constitution, Amendment 6, U.S.C.A., p. 4 (1972 Edition), and

"Amendment XIV, Section 1: . . .; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." Constitution, Amendments 13 to 14, U.S.C.A. p. 33 (1972 Edition).

"Sec. 54-47. Investigations into commission of crime.

Whenever it appears to the superior court for any county that the administration of justice requires an investigation to determine whether or not there is probable cause to believe that a crime or crimes have been committed within the county, said court may order an inquiry to be made into the matter, to be conducted before any judge of said court or a state referee designated by it. Such inquiry shall be conducted in public or private as said court orders. The attendance of witnesses and the production of documents at such inquiry may be compelled by subpoena, signed by any official authorized to issue such process. If any witness properly summoned fails to appear or to produce any documents included in such subpoena, or if he fails to answer any proper question, the judge or referee conducting such inquiry may report the matter to the state's attorney for the county wherein the investigation is being conducted and such state's attorney may file a complaint setting forth the facts at any criminal session of the superior court in such county. The court shall thereupon issue a citation to such witness to appear before said court and show cause why he should not be punished as for a contempt, and if, after hearing, the court finds that he failed to appear without due cause or failed to produce any document properly to be presented to the judge or state referee conducting the investigation or failed to answer any proper question in the course of such investigation, it may punish him as it might a witness failing to appear, to produce a document properly to be considered or to answer a proper question before the court. Witnesses may be examined by the judge or state referee conducting the

inquiry or by the state's attorney or by any other attorney or attorneys appointed by the court for such purpose. The official stenographer of said court or his assistant shall record any testimony so taken. At the conclusion of such inquiry the judge or referee conducting the same shall file with the court a report and the court shall direct whether, and to what extent, such report shall be made available to the public or interested parties. Any transcript of testimony taken at such inquiry shall likewise be filed with the court and it shall have the same powers with reference to it as it has with reference to the report; provided any person accused of crime as a result of such inquiry shall have access at all reasonable times to the transcript of his own testimony given by him in such inquiry. (1949 Re., § 8777; 1953, Supp. § 3324d.)" General Statutes of Connecticut, Vol. IX, 545 (Revised to 1968).

V. Statement of the Case

The defendant Paul Moynahan, the Deputy Superintendent of Police for the City of Waterbury, was tried and convicted on a one count substituted information in the Superior Court for New Haven County at Waterbury. This trial resulted from an original two count information charging the defendant with larceny and conspiracy. This information was issued following the defendant's arrest which arrest was based on evidence obtained during a one-man grand jury investigation conducted in Waterbury between March 18, 1969 and June 12, 1969, pursuant to 54 Conn. Gen. Stat. § 47, *supra*. Following the defendant's arrest a series of motions were filed attacking the constitutionality of the proceedings before this one-man grand jury and also attacking the constitutionality of 54 Conn. Gen. Stat. § 47, *supra*, itself.

On September 11, 1969, the defendant moved to quash the information on the ground that during the one-man grand jury proceeding under 54 Conn. Gen. Stat. § 47, *supra*, Captain Wayne Bishop of the Connecticut State Police was present and that by virtue of his presence he participated in the hearings and used evidence obtained therein to obtain a warrant for the defendant's arrest. The motion further claimed that Captain Bishop's presence contravened the limitations of 54 Conn. Gen. Stat. § 47, *supra*, and further that his presence in the grand jury hearing rendered such proceedings violative of the Due Process guaranty of the 14th Amendment. This motion was denied on September 23, 1970, the denial was assigned as error and the issue was considered by the Connecticut Supreme Court, which ruled that his presence was appropriate. (Appendix, pp. 77a-79a, Decision, pp. 2b-3b).

The defendant further attacked the constitutionality of this one-man grand jury proceeding in a Motion to Dismiss filed on September 23, 1969 by reason of the fact that the defendant was not fully warned of his constitutional rights, was not afforded the rights of effective assistance of counsel, confrontation or cross-examination and was deprived of his privilege against self-incrimination. This motion further claimed that both by reason of the procedure followed, i.e., the manner of conducting the proceeding, the presence of Captain Bishop and the publication of the grand jury report naming the defendant as a participant in a crime, and by reason of the unconstitutionality of 54 Conn. Gen. Stat. § 47 itself, the defendant was deprived of the protections guaranteed by the 5th, 6th and 14th Amendments. This motion was denied on September 23, 1969. This denial was assigned as error. The Supreme Court upheld this ruling on the ground that the hearing was merely investigatory and that no prejudicial disclosure was shown. In this regard the court ignored the evidence in

the record filed in conjunction with the motion for change of venue, which revealed that the grand-jury report naming the defendant as a criminal participant was broadly circulated and editorialized in the local press. (Appendix, pp. 77a-79a, Decision, pp. 2b-3b).

In this same motion the defendant further asserted that the Connecticut Statutes, including 51 Conn. Gen. Stat. § 175, *supra*, which provides for the appointment of the Waterbury State's Attorney by the Judges of the Superior Court denied the defendant his right to have his cause determined in an adversary, accusatorial proceeding in accordance with the 14th Amendment's Due Process guarantee. This portion of the motion was also denied on September 23, 1969 and error was assigned as to its denial. The Supreme Court, likewise, considered and rejected this claim relying basically on the history of this procedure in Connecticut. (Appendix, p. 81a, Decision, pp. 5b-8b).

The defendant also moved prior to trial pursuant to Connecticut statute for the production of all exculpatory evidence in the State's possession. Upon the State's refusal to produce such evidence the defendant moved to dismiss. During the hearing on that motion the defendant argued that he was entitled to any evidence in the State's possession which was inconsistent with or contradictory to any evidence which the State intended to offer at the time of trial. The court concurred in this assertion but refused to review the State's file indicating that the State's Attorney would fulfill his duty in this regard. (Appendix, p. 65a).

Subsequent to the court's denial of this motion on November 25, 1969 the defendant received no exculpatory evidence from the State and trial commenced some two months later. At the commencement of that trial the State dropped the conspiracy count and filed a substituted com-

plaint charging the defendant with knowingly receiving and concealing a stolen Motorola television set having a value of more than $250 but less than $2,000 in violation of 53 Conn. Gen. Stat. §§ 63 and 65.

Trial commenced on January 15, 1970. The State's proof centered around the claim that during the year 1967 and proceeding into 1968 one John Bishop was engaged in stealing color television sets from various dealers throughout Connecticut and fencing them through one Charles Vernale, a Waterbury printer. The State further claimed that on April 8, 1967 Bishop broke into Martin's Appliance in North Haven, Connecticut and stole two sets, one being a 22" Motorola console in a maple early American cabinet. The State further claimed that John Bishop helped Charles Vernale deliver this set to the defendant in late April or early May of 1967 and that delivery was made by entering the rear of the house. This evidence was introduced through the testimony of John Bishop. In addition the State offered evidence to corroborate the presence of this set in the defendant's home through the testimony of one Edward Miller. The State had proven that a damaged TV chassis was found in the woods in a town outside of Waterbury on March 17 or 18, 1969. This chassis was shown to Miller who identified a sound coil repair on it and said that he had done this repair on a set in the defendant's home. The State offered testimony through Miller and others that the type of repair which involved removing the sound coil, soldering the filaments, taping them and resoldering the coil in place was a rare and unusual one and thus readily identifiable.

The defendant through his own testimony and that of others denied ever receiving any television set from Vernale. The defendant claimed that he had a used set in his home during 1967 upon which Edward Miller did a repair to the color portion, but that this was a mahogony Danish style

set. The defendant further testified that he had been a member of the Waterbury Police Department for 38 years and had risen from supernumerary to deputy chief. He stated that he had known Charles Vernale for many years and that Vernale had been a source of information over the years both to himself and to other officers. This point was also corroborated by several witnesses. Moynahan denied any knowledge of Vernale's involvement in stolen goods prior to mid-1968 when Vernale was arrested. Extensive testimony was offered through private citizens, public officials and police officers concerning Moynahan's reputation for truthfulness and honesty.

The focus of the State's case in proving receipt and possession was the testimony of John Bishop and Edward Miller.

After John Bishop completed his direct testimony the defense moved for all prior statements and grand-jury testimony of Bishop. Over the objection of the State, the trial court made an *in-camera* inspection and ordered all such documents to be produced. Upon review it was revealed that Bishop had given several sworn statements to the State Police and had testified twice before the grand jury. Further they revealed that prior to the discovery of the Motorola in the woods, every statement by Bishop was that the set he delivered was a make other than Motorola, that it had been stolen from a different place, in a different town, at a different time, that he had never seen Moynahan before June of 1967, that he had delivered the set in a different way and at a different time than he testified to. (Appendix, p. 65a). He further testified to a long criminal record, to the fact that he had 30 to 35 charges outstanding for breaking and entering and theft of televisions and that he was promised favorable consideration if he testified against this defendant. Finally he acknowledged that he first identified the set as being a Motorola coming

from Martin's after the State's Attorney told him about it, which occurred after the set was found in the woods and was identified as coming from Martin's.

Edward Miller then testified on direct that he had repaired a 22" Motorola early American console at the defendant's home in the summer of 1967 and then described in detail the repair.

Prior to cross-examination of Edward Miller the defendant also moved for all statements and testimony given by him to the grand jury. The trial court, however, refused to order this and left it to the State's Attorney to review these statements and to furnish any relevant exculpatory portions to the defense. The defendant excepted to this procedure and urged the court to make its own inspection, which it refused to do. The defendant assigned this as error and the Supreme Court ruled that the sole responsibility for production rested with the State's Attorneys and the trial court was not required to review their decision to determine compliance with their duty to produce exculpatory evidence (Appendix, p. 65a, Decision, pp. 26b-28b).

Thereafter upon review of the prior statements it appeared that prior to his being shown the set found in the woods, Miller had been unable to recall when he repaired the set, what repair he did, the make or model of the set, and in fact had stated that he would not in any event have any recall of what repair he did (Appendix, p. 67a).

The defendants commenced cross-examination of Miller; however, at the State's request the jury was excused. The parties then argued over whether the defense could cross-examine Miller about his involvement with John Bishop and Charles Vernale. The defense claimed that Miller was in fact a Motorola dealer in the firm of Miller & Fellin, Inc. during 1967 and 1968 and had testified that he derived his sole income from that company. However, it appeared from

the statements given that he had sold at least two television sets that he got from Charles Vernale to a Mr. Stevens and a Mr. Gaspari. Therefore, the defendant wished to cross-examine him to show that he was in fact selling sets for Vernale and knew that they were stolen. However, the court ruled that since Miller was not arrested he could not be examined with respect to his possible criminal involvement. The trial court further sustained the State's objection to questions asked in the jury's absence. The defendant took exception to this ruling and assigned it as a ground of appeal. (Appendix, pp. 9a-19a). The Supreme Court, however, erroneously ruled that the claim had been abandoned at the trial level (Decision, p. 24b).

Again in his defense of the case the defendant sought to introduce the testimony of Mr. Gaspari and Mr. Stevens as to their purchase of stolen sets from Edward Miller and to offer evidence to show that the payments to Miller never went into the accounts of Miller & Fellin and to show that Miller was in fact dealing in stolen sets and keeping the proceeds himself. All this was presented in an offer of proof and testimony in the jury's absence from Mr. Stevens. The trial court refused to admit the evidence. The evidence was preserved as an offer of proof, objections and exceptions were taken and the denial was assigned as error (Appendix, pp. 19a-29a). However, the Supreme Court refused to pass on it.

In like vein the trial court refused to allow the jury to hear testimony from Miller's partner, Daniel Fellin, as to the nature of Miller & Fellin's business, the fact of television sales during 1967, the absence of records of sales to Stevens or Gaspari, but permitted an offer of proof in the jury's absence. This ruling was also assigned as error (Appendix, p. 30a). However, the Supreme Court also refused to discuss this claim. In its argument to the jury the State focused on Miller as the "one honest man" in the

case, "the one whom you can believe" and stressed the lack of any motive or interest on his part (Appendix, p. 29a).

Subsequent to the testimony of both Miller and John Bishop the State called Charles Vernale. In the jury's absence the defense requested the court to inquire as to Vernale's intention to invoke the Fifth Amendment. At this time Vernale was in prison by reason of his plea of guilty to charges stemming from his purchase of television sets from John Bishop, and he had other criminal matters pending which arose out of these dealings. The defense informed the trial court that Vernale's attorney was in court and had advised Vernale to invoke the Fifth Amendment. The defense argued that to permit such invocation in the jury's presence would violate the defendant's 6th Amendment Right of Confrontation and 14th Amendment Due Process rights. The trial court ruled that the defense had no standing to make such a claim and that it would only agree to it, if the State agreed. The State, however, refused to agree to such a voir dire inquiry. Vernale was then put on the stand and in the jury's presence invoked the Fifth Amendment on three occasions, the third occasion being in response to the question whether he ever gave a color television set to the defendant. Thereafter in its argument to the jury the State urged them to recall that when Vernale was asked if he gave the defendant a television set he took the Fifth. The defendant objected to the court's ruling, took exception to it and assigned it as error. The Supreme Court, however, ruled that such an objection was not valid unless some intentional misconduct was shown on the prosecutor's part. No attempt was made by the Supreme Court to adopt any guidelines for the handling of such matters, apparently holding that voir dire inquiry would be limited to those cases where the prosecution actually knows in advance of an intended invocation. Further the Supreme Court did not consider the defense claim that the

State and the trial court had actual knowledge after Vernale invoked the Fifth Amendment the first time and therefore the continued questioning was clearly improper (Appendix, pp. 7a-9a, Decision, pp. 20b-23b).

After Vernale's examination the defense also moved for his prior statements. Again the trial court ruled that the sole determination of what should be given rested with the prosecutor and therefore no *in camera* inspection would be done by the court. The defense again excepted to this ruling and assigned it as error. This argument, however, was rejected by the Supreme Court for the previously stated reasons (Appendix, p. 75a, Decision, pp. 26b-28b).

Following receipt of the edited portions of Vernale's testimony the defense moved to dismiss or for a mistrial because of the withholding of obviously exculpatory testimony by the State including testimony of Vernale. The defense pointed out that such testimony had been ordered to be produced prior to trial, but had not. The defense also pointed out that the prior statements of Bishop and of Miller were clearly contradictory to their direct testimony and that the prior testimony of Vernale was clearly in conflict with testimony given by Bishop and by Miller. The defendant claimed that his due process rights had been violated since the withholding of the testimony after both a request and a court order and the giving of it piecemeal precluded any proper and meaningful preparation for trial. The defense also reiterated its request that the trial court make an *in camera* inspection. The court, however, denied both the request and the motions and exceptions were taken and error assigned. The Supreme Court dismissed this claim on the ground that no exculpatory evidence existed, apparently thereby concluding that inconsistent and contradictory testimony is not exculpatory (Appendix, pp. 48a-65a, Decision, p. 28b).

The State, in an effort to establish the crucial issue of actual knowledge that the set was stolen at the time of receipt, which is a requirement of proof in Connecticut, offered as its witness Captain Wayne Bishop of the Connecticut State Police. Captain Bishop testified that he had questioned the defendant on February 8, 1969. At that time the defendant was advised of his right to counsel and waived it. The questioning was recorded and a word-for-word verbatim transcript was prepared. This transcript was available at trial and was in the State's possession. The State asked Captain Bishop to testify as to his recollection of what the defendant said in that statement. The defendant objected on the ground that such a procedure was inherently unfair, violated the best evidence rule and also violated the defendant's right to counsel, since the waiver applied only to the actual statement. The court overruled that objection and an exception was taken to it. Thereafter Captain Bishop testified that he recalled the defendant saying that he knew John Bishop was stealing and that Vernale was receiving. On cross-examination Captain Bishop acknowledged that the document in the State's possession was a verbatim word-for-word recording of what was said and that in fact the defendant said in that statement that he didn't know Bishop was stealing and didn't know Vernale was receiving and that he first learned of their involvement in March of 1968 some 11 months after the supposed delivery of the set to him. Notwithstanding this the Supreme Court ruled that the best evidence was Captain Bishop's recollection of the contents of the statement rather than the statement itself. In fact the court itself accepted the testimony of Bishop and found that the defendant said in this statement that he knew these facts on April 5, 1967, which is completely erroneous as a review of that statement would show (Appendix, pp. 31a-41a, Decision, pp. 19b-20b).

During the course of its charge to the jury the trial court charged that while a defendant did not have to take the stand, once he did his testimony should be weighed in light of his interest in the outcome of the case. The defendant excepted to this charge on the grounds that it offended the presumption of innocence and denigrated the defendant's testimony to a level below that of all other witnesses. However, the Supreme Court upheld this charge on the ground of prior precedent (Appendix, pp. 41a-44a, Decision, p. 12b).

The jury returned a guilty verdict and the defendant was thereafter sentenced to a year and a day to three years in State's Prison and fined $500. John Bishop received a suspended sentence on the charge of breaking and entering Martin's Appliance and the charge of larceny of the set in issue and another set. The State dropped the charges on the other 30 to 35 breaks to which Bishop confessed as well as on the 100 or so larcenies which were committed during these breaks.

VI. Argument of Law

Question 1: The invocation of the Fifth Amendment by a prosecution witness in the jury's presence poses a basic Sixth Amendment issue. *Douglas* v. *Alabama*, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965). The Connecticut Supreme Court, however, ignores the significance of this right by limiting its consideration to the question of whether prosecutorial misconduct brought about such invocation.

The test of whether this right has been infringed should be based on whether the prosecution knew or should have known that the Fifth Amendment might be invoked. The affirmative duty thus rests on the prosecution to bring the possibility to the court's attention whenever it arises.

Vandegrift v. *State*, 237 Md. 305, 206 A.2d 250 (1965); *State* v. *Cullen*, 103 N.J. Super. 360, 247 A.2d 346, 347 (1968); *People* v. *Pollock*, 21 N.Y.2d 206, 234 N.E.2d 223 (1967); *Mathis* v. *State*, 469 S.W.2d 796, 800-1 (Tex. Cr. App. 1971). The duty then rests with the court to hold voir dire examination in the jury's absence in order to limit the witness's testimony. *State* v. *Guido*, 40 N.J. 191, 191 A.2d 45, 50 (1963); *Green* v. *State*, 243 Md. 154, 220 A.2d 544 (1966); *State* v. *Robertson*, 102 R.I. 623, 232 A.2d 781 (1967). And see *United States ex rel. Fournier* v. *Pinto*, 408 F.2d 539, 541 (3d Cir. 1969).

Even assuming that the prosecutor's duty is limited to actual rather than constructive notice, as the Connecticut Supreme Court suggests, the record in this case establishes that such actual notice existed. While the prosecution might plead ignorance before the first invocation it must be remembered that the witness here invoked the Fifth Amendment three times. Further, it was the third question that touched upon the basic issue. Where the invocation occurs under such circumstances it must be deemed to offend the Sixth Amendment. *DeGesualdo* v. *People*, 364 P.2d 374 (Colo. 1961); *State* v. *Dinsio*, 176 Ohio St. 460, 200 N.E.2d 467 (1964); *State* v. *Johnson*, 413 P.2d 383 (Or. 1966); *Fletcher* v. *United States*, 332 F.2d 724 (D.C. Cir. 1964); *Robbins* v. *Small*, 371 F.2d 793 (1st Cir. 1967); *United States* v. *Tucker*, 267 F.2d 212 (3d Cir. 1959); *San Fratello* v. *United States*, 340 F.2d 560 (5th Cir. 1965); *United States* v. *Compton*, 365 F.2d 1 (6th Cir. 1965); *Sanders* v. *United States*, 373 F.2d 735 (9th Cir. 1967).

The evil inherent in such an invocation rests with the possible inference which the jury may draw from it. *United States* v. *Maloney*, 262 F.2d 535, 537 (2d Cir. 1959). This evil is exacerbated when as here the prosecutor in fact urged the jury to draw such an inference (Appendix, p. 9a). *Terry* v. *Commonwealth*, 471 S.W.2d 730 (Ky.

1971); *People* v. *Mack*, 120 Ill. App.2d 149, 256 N.E.2d 501 (1970). Further, as this court has pointed out in prior decisions, the infringement of a Sixth Amendment right cannot be rectified by a jury charge. *Bruton* v. *United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). And see *United States* v. *Maloney, supra* at p. 538.

Question 2: The right of a defendant to full and thorough cross-examination of a prosecution witness is clearly protected by the Sixth Amendment. *Smith* v. *Illinois*, 390 U.S. 129, 88 S.Ct. 748, 19 L.Ed.2d 956 (1968). This includes the right to elicit evidence designed to establish that witness's interest or motive to testify for the State. *Id.* at pp. 131-3.

In this case the record presented by the defendant, notwithstanding the strictures imposed by the trial court, indicates that Edward Miller was more than the honest and disinterested witness which the prosecution portrayed in its jury argument (Appendix, pp. 29a-30a). By the evidence available to the court he was at all times involved here a television repairman and dealer in Motorola televisions working for Miller & Fellin, Inc. The State's own evidence indicated that a legitimate dealer could only obtain Motorolas from two distributors in Connecticut. Such sales are always accompanied by supporting documents such as invoices. Notwithstandng this Miller admitted buying two sets from Charles Vernale, a printer, and reselling them at retail prices. Further he claimed a third sale which he later admitted to have been a lie. He also repaired sets for friends of Vernale. While he testified that this income was solely derived from Miller & Fellin, Inc., the records of that business would disclose no record of sales of the stolen sets. Notwithstanding this foundation the trial court refused to permit inquiry as to whether invoices were obtained from Vernale or how much was paid Vernale for

the sets. Further it refused to allow the jury to hear any evidence concerning the manner in which Miller obtained or sold the sets, nor to hear any evidence concerning the fact that payments for such stolen sets were kept by Miller and never recorded in the books of Miller & Fellin, Inc.

The evidence also indicated that Miller was questioned repeatedly by the police before the television set was found in the woods. During all such questioning he indicated an inability to identify the set in the Moynahan home by make, model, size or repair. It was only after he saw the set which was found that his story of a complex and unique repair was obtained.

The defendant believes that Miller had the opportunity to repair such a set in many places other than the Moynahan home. Further he had a potential motive of self-protection in view of his probable involvement as a salesman and repairer of stolen sets. Such a motive is clearly a matter of legitimate cross-examination. And the fact that Miller was not arrested has no bearing on the right to develop such a motive or interest. *Hammock* v. *State*, 7 Ala. App. 112, 61 So. 471 (1913); *State* v. *Torres*, 97 Ariz. 364, 400 P.2d 843 (1965); *People* v. *Kuberacki*, 310 Mich. 162, 16 N.W.2d 703 (1944); *State* v. *Riley*, 49 N.J. Super. 570, 140 A.2d 543 (1958); *State* v. *Warner*, 79 Utah 510, 13 P.2d 317 (1932); *Spaeth* v. *United States*, 232 F.2d 776 (6th Cir. 1956); *United States* v. *Lester*, 248 F.2d 329 (2d Cir. 1957).

The denial of an opportunity to conduct this type of cross-examination has been held on numerous occasions to constitute an infringement of the basic right of cross-examination and thus to render the defendant's trial inherently unfair. *State* v. *Little*, 87 Ariz. 295, 350 P.2d 756 (1960); *State* v. *Madden*, 161 Minn. 132; 201 N.W. 297 (1924); *State* v. *Cerenzia*, 134 Wash. 500, 236 Pac. 80 (1925); *State* v. *Willey*, 97 W.Va. 253, 125 S.E. 83 (1924);

United States v. *Greenberg*, 423 F.2d 1106 (5th Cir. 1970); *Grant* v. *United States*, 368 F.2d 658 (5th Cir. 1966); *United States* v. *Dickens*, 417 F.2d 958 (8th Cir. 1969).

Question 3: In Connecticut in order to establish guilt for the crime of receiving stolen goods it is necessary to prove that the recipient had actual knowledge that the goods were stolen at the time of their receipt, which in this case would be actual knowledge as of April, 1967. *State* v. *Fredericks*, 149 Conn. 121, 176 A.2d 581 (1961); *State* v. *Pambianchi*, 139 Conn. 543, 95 A.2d 695 (1953); *State* v. *Newman*, 127 Conn. 398, 17 A.2d 774 (1940). In this case the State's sole reliance for proof of such knowledge came from the testimony of Captain Wayne Bishop as to what he recalled the defendant saying in an interview on February 8, 1969. That interview was recorded, typed up and was conceded by the State and by Captain Bishop himself to be a complete verbatim and word-for-word transcription of everything the defendant said. Further, Captain Bishop conceded on cross-examination that the testimony he gave on direct was not contained in that statement. Thus it seemed inconsistent with sound judicial reasoning that the Connecticut Supreme Court ruled that a witness's inaccurate recollection of the contents of an accurate document will be given probative value in proving a crucial element of a crime beyond any reasonable doubt. It is for this very reason that the court in *Gray* v. *State*, 181 Md. 439, 30 A.2d 744, 746-7 (1943) held that such a procedure offended due process and was repugnant to the best-evidence rule.

The approach of the Connecticut Supreme Court likewise runs counter to the theory of conscious waiver of one's protected constitutional rights, and in particular the right to counsel. Thus if a person is advised of his right to counsel prior to interrogation and waives that right, his waiver is limited to those questions actually asked and those

answers actually given. Such waiver carries with it a consent that those questions and those answers may be used in subsequent proceedings against him. However, the ruling of the Connecticut Supreme Court seems to be that if one waives his right to counsel and submits to police interrogation he thereby agrees to the use in court, without the benefit of any further claim of constitutional protection, of statements he never made. Such a concept seems repugnant to prior definitions of waiver as applied by this court. *Johnson* v. *Zerbst,* 304 U.S. 458, 464, 57 S.Ct. 1019, 82 L.Ed. 1461 (1938); *Brookhart* v. *Janis,* 384 U.S. 1, 2-3, 86 S.Ct. 1245, 16 L.Ed.2d 314 (1966).

Question 4: By according sanctity to a charge which violates the basic presumption of innocence the Connecticut court has run counter to historical concepts of due process as expressed by this court and to numerous decisions from other states. In a lengthy analysis of the inherent unfairness of this charge the Iowa Supreme Court in *State* v. *Bester,* 167 N.W.2d 705 (Iowa 1969) held that it destroyed the presumption of innocence and stripped the defendant's testimony of its just weight. The court noted that this view was consonant with decisional law in Arizona, California, Idaho, Kentucky, Louisiana, Mississippi, Missouri Nevada, Oklahoma, South Carolina and Texas. A like result was reached in Indiana in *Garvin* v. *State,* 263 N.E.2d 371, 372 (Ind. 1970).

However, the Connecticut decision is even more questionable in that it runs counter to a long series of precedents of this court. Thus in two decisions separated by a span of 66 years this court has reaffirmed that the presumption of innocence is an undoubted part of our law, lying at the very foundation of criminal procedure. *Coffin* v. *United States,* 156 U.S. 432, 453, 15 S.Ct. 394, 39 L.Ed. 481 (1895); *Deutch* v. *United States,* 367 U.S. 456, 471, 81 S.Ct. 1587, 6 L.Ed.2d 963 (1961).

In applying this doctrine to charges such as this, this court as early as *Hicks* v. *United States*, 150 U.S. 442, 451-2, 14 S.Ct. 144, 37 L.Ed. 1137 (1893) perceived the inherent inconsistency of one to the other. In like vein this court in *Allison* v. *United States*, 160 U.S. 203, 207, 16 S.Ct. 252, 40 L.Ed. 395 (1895) followed *Hicks* and ruled that the testimony of the defendant cannot be denigrated by charges designed to strip it of its competency. Again in *Wilson* v. *United States*, 162 U.S. 613, 621, 16 S.Ct. 895, 40 L.Ed. 1090 (1896) this court considered and reaffirmed the principles in *Hicks* and *Allison*. Finally in *Quercia* v. *United States*, 289 U.S. 466, 471, 53 S.Ct. 698, 77 L.Ed. 1321 (1933) this court again renounced any practice whereby the testimony of the defendant is diminished.

Thus to suggest that the presumably innocent defendant's testimony is to be downgraded because of his obvious desire to secure his innocence is at minimum inconsistent with the presumption of innocence and is at most the actual substitution of a presumption of guilt.

Question 5: The Supreme Court of Connecticut in considering the defendant's claim that the State failed to produce exculpatory evidence prior to trial in response to the defendant's request and the court's order and failed to produce such evidence either before or during trial except in a piecemeal fashion which deprived the defendant of its effective use in countering the State's testimony, merely concluded that it could not find that such evidence existed. This conclusion can only be justified if one also concludes that evidence in the prosecution's possession which is inconsistent with or contradictory to other evidence which the prosecutor intends to offer is not exculpatory.

It is apparent, however, that this *sub silentio* opinion runs counter to several precedents in point. Thus it has been held that evidence which is inconsistent with or con-

tradictory to other evidence is exculpatory. *Miller* v. *Pate*, 386 U.S. 1, 87 S.Ct. 785, 17 L.Ed.2d 690 (1967); *Levin* v. *Katzenbach*, 363 F.2d 287 (D.C. Cir. 1966) And evidence affecting the credibility of prosecution witnesses has also been deemed to be exculpatory. *Giles* v. *Maryland*, 386 U.S. 66, 87 S.Ct. 793, 17 L.Ed.2d 737 (1967); *Napue* v. *Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed. 2d 1217 (1959). In this regard it has been specifically noted that evidence bearing on a witness's bias, interest or motive is exculpatory. *Commonwealth* v. *Kurtz*, 219 Pa. Super. 1, 280 A.2d 410 (1971).

Since the Connecticut court refused to recognize the existence of exculpatory evidence it therefore failed to consider either the duty to produce or the time when such production must be undertaken.

The duty to produce is grounded in the fairness doctrine of the due process clause. *Brady* v. *Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Therefore, the failure to produce is itself a violation and consequently the reason for non-production need not be considered. In other words the motive of the prosecutor is irrelevant. *Ibid; Hanson* v. *Cupp;* 484 P.2d 847, 850 (Or. 1971); *Ex parte Cherry*, 456 S.W.2d 949, 952 (Tex. Cr. App. 1970).

While the duty to produce rests in the first instance with the prosecutor, the trial court also has an affirmative role and responsibility. Once non-compliance has been brought to the court's attention it has a duty to make an inquiry. *Richardson* v. *State*, 246 So.2d 771, 775 (Fla. 1971). If the State claims a right to refuse compliance it has the burden to prove it. *Ibid.* The court in turn has a responsibility to make an *in camera* inspection. *People* v. *Wimberly*, 384 Mich. 62, 179 N.W.2d 623, 626 (1970). At no time, however, should the burden be on the defendant to

establish what it is that he has not been permitted to see. *United States* v. *Bryant*, 439 F.2d 642, 648 (D.C. Cir. 1971).

The time for compliance is likewise crucial. If there has been a refusal to comply with a pretrial order a mistrial is required. *State* v. *Hiteshew*, 476 P.2d 935, 936 (Or. 1970). Where the production has been given at a time and in a manner sufficient to permit adequate review and preparation for trial a reversal is mandated. *Richardson* v. *State*, *supra* at p. 775; *People* v. *White*, 123 Ill. App. 2d 102, 259 N.E.2d 357 (1970). Clearly the giving of documents when it is too late to use them for cross-examination is not compliance. *People* v. *Green*, 272 N.E.2d 721, 724 (Ill. App. 1971).

In this case it is apparent that the State had statements which directly contradicted John Bishop. These included not only his own statements but those of Vernale as well. In like manner Edward Miller's pretrial statements were inconsistent with and contradictory to his in-court testimony. Similarly, statements of Vernale contradicted Miller (Appendix, pp.). Finally it was consistently submitted that the State had evidence bearing on Miller's actual criminal involvement. However, to date no judge has indicated the slightest willingness to inquire into this matter.

Such a procedure strips the defendant of any opportunity to be afforded that basic protection which the Fourteenth Amendment mandates.

Question 6: Tracking Question 5 is the holding of the Connecticut Supreme Court that since it has never required a judge to make an *in camera* inspection to test compliance it apparently never intends to do so. This is a rather unique application of *stare decisis* since it holds that historical non-action is a sufficient basis for con-

tinued non-action regardless of any decisions of this court or of other courts which indicate that action may be mandated. The action referred to in this instance is the affirmative duty of a court to see that a defendant's due process rights are protected, which basic duty, in the case of prosecutorial non-compliance, encompasses the underlying duty to require the State to present evidence of the reasons for that non-compliance and its own duty to make an *in camera* inspection to establish that non-compliance is justified. *Richardson* v. *State, supra; People* v. *Wimberly, supra; United States* v. *Bryant, supra.*

Consistent with these duties it has been held that the court's responsibility to make an *in camera* only arises when the State has offered evidence of actual reasons for non-compliance. If no valid reason for non-compliance is asserted or found then all documents must be turned over to the defense and the court need not examine them. Conversely if a valid reason for non-compliance is given then the *in camera* inspection is mandated in order to determine whether that reason is sufficient to overcome the basic requirement of disclosure, which judgment can only be made if one has knowledge of the contents of the records and can thus assess their potential benefit to the accused. Therefore to refuse to make such an inspection is an abuse of discretion. *United States* v. *Barson,* 434 F.2d 127, 130 (5th Cir. 1970).

Connecticut, however, has adopted a totally different rule, which rule leaves the sole determination of whether compliance will occur to the prosecutor, and insulates that decision from judicial review by a flat refusal to make any inquiry as to its reasons. This runs directly counter to numerous precedents in this area. *Dennis* v. *United States,* 384 U.S. 855, 873-4, 86 S.Ct. 1840, 16 L.Ed.2d 973 (1966); *United States* v. *McGowan,* 423 F.2d 413, 418 (4th Cir. 1970); *People* v. *Allen,* 47 Ill. 2d 57, 264 N.E.2d 184, 186

(1970); *People* v. *Wimberly, supra; Richardson* v. *State, supra; People* v. *Marra*, 27 Mich. App. 1, 183 N.W.2d 418, 420 (1970); *United States* v. *Barson, supra.* And its effect is to return criminal procedure to a game of hide-and-seek. *Stevenson* v. *State*, 486 P.2d 646, 650 (Okla. Cr. App. 1971).

Question 7: The so-called one-man grand jury as it exists in Connecticut presents unique problems of due process. Under this procedure a person may be summoned to testify before a judge and may be interrogated by a State's Attorney. Further, under the holding in this case the investigating police officers may be present to counsel and assist in the interrogation. Nonetheless the witness may not have counsel present. Further this hearing may, as it did in this case, result in the public circulation in the press of the conclusions of this judge as to the criminal involvement of the person. Yet notwithstanding this pre-arrest determination of guilt he is not entitled to be told the nature of the investigation, to hear the testimony against him, to cross-examine witnesses or to present evidence in his own favor. Further the police officer in attendance at the hearings may then utilize the information obtained in order to effect the person's arrest and may later testify as to his recollection of that testimony.

The constitutional deficiencies of this proceeding are several fold. First, while it is in effect a vehicle to permit police interrogations of suspects, no effective assistance of counsel is permitted. Second, while it results in findings of criminal involvement it affords no opportunity for confrontation or defense. Third, it lacks the protection of secrecy afforded traditional grand-jury matters and in fact permits the results to be published as a public condemnation prior to giving the person any opportunity to assert his innocence.

One need not apply much imagination to realize the devastating and unfair effect of such a proceeding on a

man, such as the defendant, who was held in high esteem in his community, and who had spent 38 years in public service as a police officer. Further notwithstanding the court's rejection of the motion for change of venue, one need only look at the newspaper articles filed as exhibits to see how inflammatory and prejudicial such publication is on the person's opportunity to obtain an impartial jury.

Such a proceeding it is submitted sharply conflicts with settled principles of due process.

The presence of police officers or other persons in grand jury proceedings has been condemned and has been held to render such proceedings void in *People* v. *Minet,* 296 N.Y. 315, 73 N.E.2d 529 (1947). And see *United States* v. *Edgerton,* 80 F. 374, 375 (D. Mont. 1897). Similarly, in holding that a bill permitting police officers to be present at such hearings was unconstitutional the Massachusetts Supreme Judicial Court pointed out that their presence affords an opportunity for subjecting witnesses to fear or intimidation, for preventing freedom of full disclosure and for infringing the secrecy of the proceedings. *Opinion of the Justices,* 232 Mass. 601, 123 N.E 100, 101 (1919).

The proceeding itself seems clearly to conflict with the accused's right to counsel. At the time of this hearing it was apparent to the State that the defendant was under investigation since he had been interrogated over a month before (on February 8, 1969). Under these circumstances his rights under *Miranda* v. *Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) had attached. *State* v. *Sarcone,* 96 N.J. Super. 501, 233 A.2d 406, 410-11 (1967); *People* v. *Laino,* 10 N.Y.2d 161, 176 N.E.2d 571, 577 (1961).

Further the fact that this proceeding resulted in a public conclusion of criminal involvement requires that due process standards be met. *Jenkins* v. *McKeithen,* 395 U.S.

411, 89 S.Ct. 1843, 23 L.Ed.2d 404 (1969); *In Re Oliver*, 333 U.S. 257, 278, 68 S.Ct. 499, 92 L.Ed. 682 (1948). This includes the right of confrontation and cross-examination. *ibid.* It also includes the right to counsel. *State* v. *Sarcone, supra*, 233 A.2d at 411; *People* v. *Laino, supra*, 176 N.E.2d at 577. Where such rights are not granted the remedy of dismissal is mandated. *Ibid.* This should be particularly true where as here the proceedings resulted in a public branding by State officials, since the secrecy which gives dignity to the traditional grand jury has been ignored. *United States* v. *Smyth*, 104 F. Supp. 283, 288 (N.D. Cal. S.D. 1952); *Hale* v. *Henkel*, 201 U.S. 43, 59, 26 S.Ct. 370, 50 L.Ed. 652 (1906). And see *United States* v. *Aquco*, 310 F.2d 817, 832 (2d Cir. 1962).

Many years ago Justice Cardozo condemned this one-man grand jury system as an inquisition where the judge ceases to perform a judicial role and becomes both judge and prosecutor. *In Re Richardson*, 247 N.Y. 401, 160 N.E. 655, 656, 658-9 (1928). It would seem appropriate that this court now do the same.

Question 8: Connecticut stands alone as the only state in the nation wherein the judges appoint the prosecutors. Nedrud, *The Career Prosecutor*, 51 J. Crim. L. & P.S. 343, 344 (1960).

This procedure, it is submitted, conflicts with one of the basic tenets of the accusatorial system, i.e., the total separation of the judicial and prosecutorial functions. That accusatorial system is a part of our societal fabric and is thus enforceable against the states. *Malloy* v. *Hogan*, 378 U.S. 1, 19, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964). It was for this reason that Professor Nedrud pointed out that the separation of functions is vital to the process of criminal justice, and that therefore the judge should have no right to choose the prosecutor any more than the prosecutor

should have the right to choose the judge. Nedrud, *The Career Prosecutor,* 52 J. Crim. L. & P.S. 104 (1960). And Judge Learned Hand noted in *United States* v. *Marzano,* 149 F.2d 923, 926 (2d Cir. 1945) that the two functions are quite separate in the administration of justice and must not therefore be merged.

The rejection of this system in every other jurisdiction should suggest its shortcomings. However, more basically the precedents cited should require an examination of this procedure in order to assess whether it is consonant with basic due process principles.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of the State of Connecticut.

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APPENDIX

Appendix (Opinion and Judgment of Supreme Court of Connecticut as Amended)

SUPREME COURT

January Term, 1973

Docket No. 7032

STATE OF CONNECTICUT v. PAUL MOYNAHAN

Information charging the defendant with the crime of receiving stolen goods, brought to the Superior Court in New Haven County at Waterbury and tried to the jury before Zarrilli, *J.*; verdict and judgment of guilty and appeal by the defendant. No error.

Edward F. Hennessey, with whom was James A. Wade, for the appellant (defendant).

Dennis F. Gaffney, special assistant state's attorney, for the appellee (state).

Loiselle, *J.* The defendant was found guilty by a jury of the crime of receiving stolen goods in violation of General Statutes § 53-65. He has appealed from the judgment rendered on the verdict, assigning thirty-two errors. All of the claimed errors have been considered but no useful purpose would be served by a lengthy discussion of each assignment of error. Many of the issues raised by the defendant have been previously determined by this court and are well established by precedent in our law. Only those issues, therefore, which merit comment are discussed.

The defendant in his assignment of errors attacks the court's (Barber, *J.*) denial of his motion to quash, his

motion for change of venue and his motion to dismiss on the ground that the state's attorney is appointed by the judges of the Superior Court and, hence, unconstitutionally appointed. The defendant further claims that the inquiry under General Statutes § 54-47 was unconstitutional; that the warrant was issued without probable cause, and that the court erred in its denial of the defendant's motion to dismiss based on a claim that the state's attorney did not provide exculpatory information as ordered by the court. All of these motions were made before trial.

I

The motion to quash alleged that Wayne Bishop, a captain in the state police, was present at an investigatory inquiry held under § 54-47[1] on May 6, 1969, and the finding and both appendices reveal that Captain Bishop was in fact present. The motion alleged that Captain Bishop's presence was illegal and that he "further participated illegally in said hearings as he acted as an attorney propounding questions to the witnesses." There is nothing in the record or the appendices to substantiate this latter claim. In fact, Captain Bishop's testimony narrated in the state's appendix to its brief is to the contrary.

While the record is devoid of an order for an inquiry under § 54-47, it is evident that an inquiry was in fact conducted by former Chief Justice O'Sullivan, a state referee, and that evidence taken at that inquiry was used against the accused by the state through the testimony of Captain Bishop. The defendant limits his argument in his brief to the claim that the presence of Captain Bishop at the investigatory inquiry was a violation of § 54-47.

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[1] Although described in the vernacular as a "one man grand jury," the correct designation for a proceeding under § 54-47 is "investigatory inquiry."

General Statutes § 54-47, enacted in 1941, provides for a one-man investigation significantly different from the constitutional grand jury empowered to indict under General Statutes § 54-45. Since *Lung's Case*, 1 Conn. 428, the proceedings under § 54-45 have been uniform by rule of court. It is clear that § 54-47 affords a greater informality and a more broadly based scope of inquiry than that of a constitutional grand jury with power of indictment. The investigatory inquiry can be private or public, witnesses may be questioned by the judge, the referee, the state's attorney, the assistant state's attorney or any other attorney appointed for that purpose and the report made to the Superior Court by the judge or the referee may be made public. Anyone accused of a crime as a result of such inquiry is guaranteed access to the transcript of his own testimony. Furthermore, there is no restriction placed by statute on the presence of any person at the inquiry. The modern investigatory inquiry authorized by § 54-47 has functions similar to the general investigatory grand jury known to common law which could inquire into crimes. *State* v. *Menillo*, 159 Conn. 264, 273, 268 A.2d 667. There remains, however, one essential difference which distinguishes the investigatory inquiry from the common-law investigatory grand jury. Under § 54-47 the judge or referee who conducts the inquiry has no power or authority to issue an indictment. His sole function is to investigate and report his findings to the court. The court has the option of making the information garnered by the inquiry available to the state's attorney but this decision under § 54-47 rests with the court, not the investigating officer. The latitude afforded the judge or referee under the statute is designed to ensure that the proceeding is conducted in an orderly and expeditious manner. To that end, it was proper for the referee conducting the investigation to utilize whatever assistance he deemed necessary, including the presence of the officer who originally was charged with the investigation prior to a court-ordered inquiry.

The final motion to dismiss submitted prior to trial is divided into three parts, of which only two are briefed. Our discussion is limited to those portions of the motion which were briefed. The motion to dismiss attacks § 54-47 as unconstitutional on its face because of a lack of minimum standards of due process. The defendant's principal claims are that the report can be made public, that counsel are precluded from attendance, and the right of confrontation and of cross-examination is denied a witness. The defendant relies principally on *Jenkins* v. *McKeithen,* 395 U.S. 411, 89 S. Ct. 1843, 23 L. Ed. 2d 404. That case, however, is inapposite to the present matter. The Supreme Court in *Jenkins* v. *McKeithen,* supra, 431, found that the function of the commission under attack was "to make specific findings of guilt, not merely to investigate and recommend." It specially held that "the commission exercised a function very much akin to making an official adjudication of criminal culpability." The Supreme Court in the *Jenkins* case reaffirmed *Hannah* v. *Larche,* 363 U.S. 420, 80 S. Ct. 1502, 4 L. Ed. 2d 1307. The *Hannah* case, supra, 441-42, had held that in a purely investigatory inquiry by a body appointed or created for that purpose alone the rights of apprisal, confrontation, or cross-examination of witnesses were not constitutionally required by the due process clause. The inquiry under § 54-47 is made by an independent judicial officer and is investigatory and nonadjudicative. An inquiry is conducted and a report is made to the court. The inquiry has no other purpose or function and therefore does not violate the defendant's due process rights. *Salvaggio* v. *Cotter,* 324 F. Supp. 681 (D. Conn.), affirmed, 447 F.2d 1406; see also *Puglia* v. *Cotter,* 333 F. Supp. 940 (D. Conn.), cert. denied, 405 U.S. 1073, 92 S. Ct. 492, 31 L. Ed. 2d 806, affirmed, 450 F.2d 1362. The further claim that the inquiry is a critical stage of a proceeding requiring the presence of counsel under the *Miranda* rule is without merit. The inquiry is

investigatory and cannot be described as custodial where "a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda* v. *Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694.

The investigation in this case was conducted in private. The defendant's claims of prejudicial disclosure are merely conjectural; see *Jenkins* v. *McKeithen*, supra, 427; and adequate remedies were available to provide timely safeguards against publication of the findings. *Kennedy* v. *Justice of District Court*, 356 Mass. 367, 252 N.E.2d 201. Furthermore, it is clear that this investigation was not an accusatorial or adjudicative process but was simply investigatory in design and operation. Section 54-47 did not deny the defendant due process guarantees and is not an unconstitutional exercise of legislative authority. Diligent inquiry to ferret out crime will not be frustrated or denied so long as due process safeguards are available to protect the rights of the parties affected.

The remaining part of the motion to dismiss attacks the appointment of the state's attorney by the Superior Court judges as a denial of due process guaranteed by both the federal and state constitutions. The basis of the defendant's argument is that the state's attorney exercises an executive function in prosecuting crimes and cannot constitutionally be appointed by the judicial department. Alternatively, the defendant contends that the exercise of this appointment power, if constitutionally valid, nevertheless violates principals of due process by interjecting the judiciary unnecessarily into the accusatorial system.

General Statutes § 51-175 directs that the appointment of the state's attorney be made by the judges of the Superior Court.

Under the constitution of the state of Connecticut, appointments, other than those whose mode is prescribed, are governed by the division of governmental powers. *State* v. *Stoddard,* 126 Conn. 623, 627, 13 A.2d 586; *Norwalk Street Ry. Co.'s Appeal,* 69 Conn. 576, 586, 37 A. 1080. "Our own Constitution like most constitutions, provides for certain elective and legislative appointments; but except in the cases specified, appointment to office is an exercise of executive power, unless used as a means appropriate to the exercise of power granted to another department; and when so used it is not the exercise of executive power within the meaning of the Constitution." *Norwalk Street Ry. Co.'s Appeal,* supra, 595.

In determining whether the appointment of a state's attorney by the judges of the Superior Court is a means appropriate to the exercise of the judicial power, a controlling consideration is the functional consistency of such an appointment with the duties and powers of the judicial department as distinct from that of the executive department.

The functions of a state's attorney are not purely those of an executive officer. As a representative of the people of the state, he is under a duty not solely to obtain convictions but, more importantly, (1) to determine that there is reasonable ground to proceed with a criminal charge; *State* v. *Hayes,* 127 Conn. 543, 581, 18 A.2d 895; (2) to see that impartial justice is done the guilty as well as the innocent; and (3) to ensure that all evidence tending to aid in the ascertaining of the truth be laid before the court, whether it be consistent with the contention of the prosecution that the accused is guilty. *State* v. *Harris,* 147 Conn. 589, 598, 164 A.2d 399; *State* v. *Zimnaruk,* 128 Conn. 124, 127, 20 A.2d 613.

The state's attorney, thus, is an officer charged with important duties and responsibilities in the administraton of justice. Such duties of a state's attorney are entirely consistent with judicial power as prescribed by our constitution. *State* v. *Hayes, supra.*

This court in *Hopson's Appeal*, 65 Conn. 140, 146, 31 A. 531, held that when a function lies on the borderline of the division between executive and judicial power, the exercise of that power by the judiciary may be constitutionally valid and the practical construction of this exercise of power, both before and after the adoption of the constitution, may be safely accepted. The history of the statute authorizing judicial appointment of the state's attorney demonstrates a longstanding commitment to this practice.

Beginning in 1704 the assembly directed that the queen's attorneys (now the state's attorneys) be appointed by the county courts. "[T]he neglect of putting good lawes in execution against imoral offenders, that therefore such neglect may be prevented for the future: It is ordered and enacted by this Court [Assembly] that henceforth there shall be in every countie a sober, discreet and religious person appointed by the Countie Courts to be Atturney for the Queen, to prosecute and implead in the lawe all criminall offenders, and to doe all other things necessary or convenient as an atturney to suppress vice and imorallitie." See 4 Col. Rec. 468. In 1730 this appointment procedure was continued. 7 Col. Rec. 280.

The revision of 1808, the last revision of the statute laws of the state of Connecticut prior to the adoption of our state constitution in 1818, directed that state's attorneys be appointed by the respective county courts. Statutes, 1808, p. 67, § 6. While the constitution was silent with regard to this issue, the first revision of the statute laws of the state of Connecticut in 1821 [3] subsequent to the adoption of

[3] The special committee appointed by the legislature to examine statute laws following the adoption of the constitution in 1818 reported in part as follows: "The difficulty of diffusing a general knowledge of a voluminous code, and the perplexity and confusion arising from an intermixture of laws in force and not in force, have induced the committee to omit all statutes, and parts of statutes, which have been directly repealed, or superseded by new provisions, or become obsolete by the change of manners and customs, or inconsistent with the sentiments of the age, or repugnant to the principles and spirit of the constitution." Statutes, 1821, p. viii.

our state constitution in 1818, also directed that state's attorneys be appointed by the respective county courts. Statutes, 1821, p. 141, § 22; see also 2 Swift, Digest, p. 369 (1823).

The practice of judicial appointment of state's attorneys has prevailed to the present time without interruption and, until recently, without disputation. The delegation of this appointment power to the courts since 1704 is, in accordance with the rule of *Hopson's Appeal, supra,* constitutionally valid and the appointment of state's attorneys by the judicial department is appropriate within the scope of the judicial power confided to the courts by the constitution. Exercise of that power is incident to legitimate judicial functions. The constitutionality of this grant of power was clearly recognized by this court in *Adams* v. *Rubinow,* 157 Conn. 150, 163 n., 251 A.2d 49, and is no longer open to question.

The claim that the appointment of the state's attorney by the judiciary is foreign to the accusatorial system may be valid in some jurisdictions but in this state the system of judicial appointment of the state's attorney has functioned effectively for nearly 270 years with no prejudice to those accused of criminal offenses. The appointment of state's attorneys by the judiciary does not violate the defendant's due process rights guaranteed by the state and federal constitutions nor does it in any way diminish the salutary benefits of our accusatorial system.

The assignment of error directed to the court's denial of the motion for a change of venue is unsupported in the record or in the appendices to the briefs by any evidence of publicity likely to cause prejudice against the accused and consequently is not discussed.

The second motion to dismiss filed in November, 1969, alleged that the state's attorney did not provide defense counsel with all exculpatory material as previously ordered

by the court. An examination of the record fails to disclose any merit to this claim. Similar motions made during the trial are discussed elsewhere in this opinion.

II

The defendant's claims of error relating to the court's charge are tested by the claims of proof in the finding. *Robinson* v. *Faulkner*, 163 Conn. (34 Conn. L.J., No. 4, pp. 12, 13); *Busko* v. *DeFilippo*, 162 Conn. 462, 464, 294 A.2d 510. The state made the following claims of proof: On April 6 or 7, 1967, John Bishop broke into the Martin Appliance Company store in the town of North Haven and stole two television sets, one of which was a twenty-two-inch Motorola maple console color TV valued at $527.90 wholesale and $639 retail. Bishop then transported these sets to the home of Charles Vernale, who paid Bishop $200 for each set. Late in April, or early in May, 1967, Bishop went to Vernale's home to collect payment for other TV sets he had delivered to Vernale. On that occasion, he and Vernale loaded the stolen Motorola set into Vernale's station wagon and then drove to the defendant's home. Bishop and Vernale carried the set into the defendant's living room and left it there. The defendant was present at the time. The defendant was a regular visitor at Vernale's home. On one occasion in 1966, the defendant saw Bishop at Vernale's house and told Bishop: "I don't care what business dealings you and Charles have between you. That is your business, but if you ever do anything in Waterbury, I will have to nail you for it."

Edward Miller, a Waterbury television repairman, was called by the defendant to repair a color TV set on a Sunday in June, 1967. Miller repaired the set and was paid $15. In February, 1969, Miller told the state police that he had repaired a Motorola twenty-three-inch color television set, early American colonial, maple finish, for the defendant and that the repair consisted of soldering a wire

within the sound coil, wrapping it with black tape and then replacing the sound coil in a metal shield which would render the repair not visible without opening the metal shield. On March 27, 1969, a television set was found in the town of Terryville, about six and one-eighth miles from the defendant's home. Although the set had been smashed, the serial number identified the set as the one stolen from the Martin Appliance Company. Miller was shown the set on April 1 and 2, 1969. He informed the state police that if they opened the metal shield over the coil they would find the black plastic tape he had used, which was not visible from the outside. On April 3, 1969, the state police examined the set and found that when the metal shield on the sound coil wire was removed, the sound coil did have black tape on it and had been soldered.

On February 9, 1969, the defendant was interviewed by the state's attorney and Captain Wayne Bishop of the state police (hereinafter referred to as Captain Bishop to distinguish him from John Bishop who is referred to as Bishop). The defendant was advised that the questioning concerned Vernale and possible receipt of stolen goods by the defendant from Vernale. At this interview the defendant was advised of his rights and he waived his right to counsel and stated that in April, 1967, he knew that Vernale was receiving stolen goods; that Bishop was involved in breaking and entering and bringing goods to Vernale; that he would never take anything from Vernale because of his record, activities and reputation as a receiver of stolen goods; that he never had a color TV set before December, 1968; and that he probably should have warned his son about taking an air conditioner from Vernale.

On May 6, 1969, at the investigatory inquiry held by State Referee O'Sullivan with Captain Bishop present, the defendant stated he had had a twenty-three-inch color Motorola TV set previous to December, 1968, which had been given to him by Tony Caggiano, who was then de-

ceased. The defendant further testified that he had met a television repairman at Vernale's home and that the repairman had repaired his set; that he knew that both Vernale and Bishop had criminal records; that he knew three stolen television sets were removed from Vernale's home in 1965; that he knew Vernale was receiving stolen goods from breaks occurring in places other than Waterbury and that Vernale was to call him if any of the merchandise was brought to Vernale; and that he was friendly with Vernale.

The defendant offered evidence to attack the credibility of John Bishop, who was then awaiting sentence for breaking and entering on about thirty to thirty-five outstanding warrants. He offered evidence attacking the credibility of Miller. This evidence involved inconsistent statements made by Miller at different times and Miller's sale of two sets received from Vernale and the fact that the television set repairs were made by Miller for Vernale. The defendant testified that in his statement to Captain Bishop and the state's attorney he had denied receiving a television set from Vernale or knowing that Vernale was receiving stolen goods until sometime in 1968. The defendant also testified that he stated in the interview that Vernale was his informant from 1959 to 1968. The defendant offered evidence regarding his statement before the investigatory inquiry on May 6, 1969. He stated he had received a color TV set from Tony Caggiano in 1967 which was mahogany and not maple, and that it had been repaired by a man he had met at Vernale's home. He also stated that he was a subordinate of Detective Byrnes when some TV sets were found by them at Vernale's. The defendant introduced various witnesses who testified both as to his general reputation in the community for truth and veracity and for honesty and as to their own personal opinion as to his character traits. The facts claimed to have been proven by both the state and the defendant are more extensive than that presented but the recital above is sufficient to test the portions of the court's charge which the defendant claims were erroneous.

The defendant has briefed seven assignments of error directed to the charge of the court. The claim that the court erred in its charge that in weighing a witness' testimony the jury should consider the witness' interest, including the defendant's interest in the verdict, is without merit since the instruction was in accordance with our procedure and was proper. *State* v. *Guthridge,* 164 Conn. (34 Conn. L.J., No. 26, pp. 1, 3).

The court, in its charge, referred to the fact that Frank Maiola admitted that he gave false testimony with respect to a question asked of him by the state. The court cautioned the jury about considering the remainder of his testimony but told them the acceptance of his testimony or any part of it was for them to determine. It then stated: "This rule must be applied by you not only to the testimony of Frank Maiola, but also to the testimony given by any other witness who has appeared in court, including, of course, the testimony given by the defendant, Paul Moynahan, himself." The defendant excepted to this portion of the charge claiming the court picked out Maiola and the defendant by name and did not name three other witnesses who the defendant claimed gave contradictory statements. Maiola admitted that he consciously told an untruth under oath while testifying. No other such concession on the part of any witness has been established by either party. The charge was a guarded instruction on the maxim, falsus in uno, falsus in omnibus. *Willametz* v. *Guida-Seibert Dairy Co.,* 157 Conn. 295, 301, 254 A.2d 473; *Craney* v. *Donovan,* 92 Conn. 236, 246, 102 A. 640. Under such circumstances it was proper for the court to comment on this evidence. *State* v. *Cari,* 163 Conn. 174, 182, A.2d ; *State* v. *Tropiano,* 158 Conn. 412, 428, 262 A.2d 147, *cert. denied,* 398 U.S. 949, 90 S. Ct. 1866, 26 L. Ed. 2d 288; *State* v. *LaFountain,* 140 Conn. 613, 620, 103 A.2d 139. The inclusion of all other witnesses, including the defendant, by name to be affected by this rule was simply a caution to the jury that the rule applied to all witnesses who testified and did not place

undue emphasis on the defendant's testimony by noting that the rule also applied to the defendant.

In the charge, the court commented on the state's claim that the defendant had made inconsistent statements. The court noted that the state had asserted that, under oath during the investigatory inquiry, the defendant had stated that he never had a color TV set in his home and during the trial he made a contradictory statement. The court charged that a contradictory statement made by a party could be used not only to attack his credibility but also as an admission. The court carefully stated that if such statement was not made, the rule would be inapplicable and further stated in effect that even if the jury believed the statement was made they could conclude he never in fact had a color TV set or that one had been given to him by another. The defendant does not seem to attack the correctness of the court's statement but claims comment on that particular piece of evidence tended to focus the jury's attention unduly on it. The court correctly stated the rule that an admission by a party could be used not only to affect his credibility but also to establish proof of matters stated therein. *Pluhowsky* v. *New Haven,* 151 Conn. 337, 343, 197 A.2d 645; *Sears* v. *Curtis,* 147 Conn. 311, 316, 160 A.2d 742. The instruction as given was only applicable to the defendant and was therefore proper.

The defendant introduced various witnesses who testified as to the defendant's general reputation in the community for truth and veracity and also as to their own personal opinion as to these character traits. The court charged at some length on the subject of general reputation. A portion of this part of the charge stated: "On a doubtful question, good reputation alone might be sufficient to raise a reasonable doubt as to the guilt of the accused." The court ended this portion of the charge by saying: "It must be a general reputation representing a concensus of the common feeling of his fellows as to him." The defendant's claim of error is that the court also should have charged that "good

character evidence need not be limited to a person's general character in the community, but may likewise be relevant and properly presented through the testimony of the opinion of a given individual as to that character." The defendant's criticism of the charge is that evidence of traits of character offered by one who has knowledge of those traits is also admissible in evidence in addition to evidence of general character. *Richmond* v. *Norwich,* 96 Conn. 582, 596, 115 A. 11. With regard to evidence of reputation, the charge was correct. *State* v. *Blake,* 157 Conn. 99, 104, 249 A.2d 232; *State* v. *Alderman,* 83 Conn. 597, 602, 78 A. 331. While the defendant did offer evidence of a personal trait for truth and veracity, the record does not reveal any request for a specific charge on this phase of the evidence. Under the circumstances, it was not error to omit reference to it from the charge. *State* v. *Penn,* 144 Conn. 148, 153, 127 A.2d 833.

The charge concerning the elements of knowledge and concealment necessary for conviction of the charge of receiving stolen goods is attacked by the defendant on the ground that the court improperly and unfairly commented on the evidence. The claim that the evidence was insufficient to warrant the charge is commented on in the portion of the opinion discussing the denial of the defendant's motion for judgment.

General Statutes § 53-65 provides that a criminal offense is committed by "[a]ny person who receives and conceals any stolen goods or articles, knowing them to be stolen." The essential elements of the crime are: "(1) The property must have been stolen. (2) It must have been received by the accused with the knowledge that it was stolen. (3) It must have been concealed within the meaning of the law. (4) It must have been received and concealed by the accused with a felonious intent, that is, a criminal intent to deprive the true owner of his property." *State* v. *Palkimas,* 153 Conn. 555, 558, 219 A.2d 220; see also *State* v. *Alderman,*

supra, 600. In commenting on the necessary element of the statute, that the television set must have been received with knowledge that it was stolen, the court stated that the state was relying on circumstantial evidence to prove knowledge. It cautioned the jury that carelessness of the accused in ascertaining the facts was not enough, but that they must find actual knowledge on his part at the time the television set was received. It then commented on the claims of the state relevant to knowledge.[3] The court commented on the claims

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[3] "Knowledge of the fact that the television set was stolen at the time when it was received can be inferred from the circumstances if they were such that a reasonable man of honest intentions should have come to that conclusion. On this element of the case the State claims that you have the right to draw an inference of knowledge from Paul Moynahan's admission that in 1965 he was at the home of Charles Vernale to investigate the theft of two TV sets and that these were later removed from the home of Charles Vernale by the State Police. The State also asks you to infer knowledge that the set in question, that is, Exhibit K, was stolen from the statements allegedly made by Paul Moynahan to Charles Vernale and to John Bishop to the effect that, 'Whatever business dealings you have is your business but if you do anything in Waterbury, I will have to nail you for it.'

"If you find that such a statement was made by Paul Moynahan and that he did participate in an investigation where stolen goods were recovered from the home of Charles Vernale in 1965, you may draw the inference that he, Paul Moynahan, knew that Charles Vernale and John Bishop were engaged in nefarious business activities, and that he, Paul Moynahan, as a reasonable man with honest intentions should have known that the TV set, Exhibit K, was stolen at the time that it was allegedly delivered to him and allegedly received by him.

"The State also makes the claim that the entire personal and social relationship between Paul Moynahan and Charles Vernale was such that Paul Moynahan knew that Charles Vernale was dealing in merchandise stolen by John Bishop and from this relationship Paul Moynahan, as a reasonable man with honest intentions, should have known that the TV set, Exhibit K, was stolen when it was received by him, providing, of course, you do find that it was in fact received by him."

of the defendant and further stated that if the knowledge was gained after the defendant came into possession of the television set, there could be no conviction.

Although the defendant makes other claims in his brief, the exception to this portion of the charge when made was limited to the claim that if the facts as stated were proven, each fact "standing by itself" would be insufficient as a matter of law to support a finding of knowledge. It is clear that the court combined the first two claims, and charged that if the jury found that the defendant did tell Bishop that he knew of his activities and if they found that the defendant did participate in recovery of stolen goods from the home of Vernale in 1965, an inference could be made that the defendant, as a reasonable man with honest intentions, should have known the set was stolen. The second reference in the charge alluded to the state's claim that through the entire personal and social relationship with Vernale, the defendant should have known that the television set was stolen. That knowledge of a fact may be inferred from other facts proven is a well-settled rule of evidence. The policy consideration underlying this rule is that frequently the only method of establishing what lay in the mind of a person when he performed an act is through such an inference. Circumstantial evidence is offered and received for this purpose and jurors are properly told that they may, not that they must, infer knowledge, intent, or mental state or condition from such facts. The purpose of the language in the charge was to instruct the jury that they were not to find guilty knowledge from these facts unless the defendant, as a reasonable man, should, from the same facts, have inferred at the time he received them that the goods were stolen. *State* v. *Pambianchi*, 139 Conn. 543, 546, 95 A.2d 695; *State* v. *Weiner*, 84 Conn. 411, 416, 417, 80 A. 198. This rule also applied to the second claim of the state as charged by the court. See *State* v. *Fredericks*, 149 Conn. 121, 124, 176 A.2d 581; *State* v. *Heno*, 119 Conn. 29, 32, 174 A. 181; *State* v. *Kaplan*, 72 Conn. 635, 45 A. 1018; *People*

v. *Estrada*, 256 Cal. App. 2d 136, 157, 44 Cal. Rptr. 165; 66 Am. Jur. 2d, Receiving Stolen Property, § 25; note, 147 A.L.R. 1058. The court, by the use of the words "you may draw the inference," left the issue of the defendant's knowledge that the set was stolen to the jury. The court's charge on the issue of knowledge was proper.

The defendant excepted to the instruction in the charge on the necessary element of concealment contained in the statute,[4] first claiming that if the television set was

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[4] "Now, the third element of the crime of receiving stolen goods, you must be satisfied that, having received the goods knowing them to have been stolen, the accused concealed them. 'Concealed' as used in this statute has somewhat a broader meaning than that which one ordinarily uses the word, that is, to hide. It, of course, includes that, but the requirement of concealment is met if the accused did anything which would make the discovery or identification of the property more difficult.

"On this element of the crime of receiving stolen property, evidence has been offered by the State to indicate that the TV set was placed in the home of Paul Moynahan in a sun porch away from the view of the general public. If you accept such testimony and find it to have been proven beyond a reasonable doubt, you can conclude that the TV set was concealed within the meaning of our law.

"There is also evidence before you to the effect that the police found smashed parts of the TV set in an isolated Greystone section of Terryville in the Town of Plymouth. Again, if you accept this testimony beyond a reasonable doubt, you can find that something was done to the set which made it more difficult to be discovered or identified.

"The act of smashing a TV set, if you find that such was the case here, constitutes an act of concealment within the meaning and intent of the statute relating to the crime of receiving stolen goods. On the other hand, if you find that the TV set and the component parts thereof which have been offered by the State in evidence was not delivered to the home of Paul Moynahan, and that Paul Moynahan did not smash the set, you must, of course, come to the conclusion that he could not have concealed it. In this event the essential elements of concealment will not have been proved by the State beyond a reasonable doubt, and again, in that event your verdict must be in his favor."

smashed, the act of smashing must have "coalesced" in time with receipt of the set in order to prove concealment and secondly asserting that placing the set on the sun porch was not a concealment as a matter of law.

The word "conceals" in the statute was not used in a technical sense but includes all acts done which render the discovery or identification of property more difficult. *State* v. *Ward,* 49 Conn. 429, 442; *Wertheimer* v. *State,* 201 Ind. 572, 169 N.E. 40. The court's charge that the jury could conclude that the TV set was concealed if it believed testimony that the television set was placed by the defendant in a sun porch of his private home out of the view of the general public was correct. Concealment is not limited to proof that the stolen property was hidden or kept out of sight, it is enough if it is proven that the property was withheld from the owner and made difficult for the owner to discover and this includes acts or conduct which enables the one who received the stolen goods to convert the property to his own use. *Commonwealth* v. *Matheson,* 328 Mass. 371, 103 N.E.2d 714; *State* v. *Crum,* 255 La. 60, 229 So. 2d 700; *Wertheimer* v. *State,* supra; 66 Am. Jur. 2d, Receiving Stolen Property, § 4.

The smashing of the television set was not an act that must have occurred when the set was received in order to be concealment within the meaning of the statute as claimed by the defendant. If the act of smashing the television set was found by the jury to have been accomplished by the defendant, it was an act "done which rendered the discovery or identification of the property more difficult." *State* v. *Ward* supra. The court was not in error in charging as it did on the two elements of knowledge and concealment.

III

The record reveals forty-four exceptions to court rulings occurring during the course of the trial. Only those assignments of error which merit comment will be discussed.

At the trial the state offered the testimony of Captain Bishop of the Connecticut state police regarding an interview with the defendant, conducted in the state's attorney's office in Waterbury in the presence of the state's attorney, Superintendent Sullivan of the Waterbury police department and two state police officers. The interview was recorded and a verbatim transcript was made and delivered to the defendant prior to trial. The state examined Captain Bishop as to his recollection of this interview. The defendant objected to this testimony, claiming that the transcript of the recorded interview was the best evidence. A distinction must be drawn between a case in which proof of the document is essential and one in which the document is only collaterally involved. The best evidence rule has no application to the present case because the state was not attempting to establish the existence or the exact terms and contents of the verbatim transcript. The questions sought to discover what the witness had said during the interview. Anyone who has heard an oral statement made and remembers it may testify to what was said. *Brzezinski* v. *United States,* 198 F. 65, 66 (2d Cir.). Captain Bishop was not asked what the transcript contained but what the defendant had said in the interview. Where one testifies to what he has seen or heard, such testimony is primary evidence regardless of whether such facts are reduced to writing. While recordings might be more accurate and reliable evidence under ordinary circumstances than testimony from memory, the latter is not rendered incompetent by the fact of the existence of the former. *People* v. *Kulwin,* 102 Cal. App. 2d 104, 226 P.2d 672. The defendant has misinterpreted the applicability and

purposes of the best evidence rule. *Farr* v. *Zoning Board of Appeals,* 139 Conn. 577, 582, 95 A.2d 792; *Kilpatrick* v. *Kilpatrick,* 123 Conn. 218, 225, 193 A. 765; 29 Am. Jur. 2d, Evidence, § 449. The defendant's brief points out suggested inconsistencies between the testimony of Captain Bishop and the actual contents of the statements as shown by the transcript. At all times, however, the defendant had possession of the entire transcript of the interview and, following proper procedure, could have used it in cross-examination to show discrepancies in any of the testimony given concerning this interview. Further, the use of the recording or the transcript of the recording would have run the risk of the prejudicial effect cautioned against in *State* v. *Mortoro,* 160 Conn. 378, 390, 279 A.2d 546. The court was not in error in its ruling.

During the course of the trial the state informed the court that it intended to call Vernale as a witness. The state had contended that Vernale transferred a stolen television set to the defendant. Representing to the court that it could not vouch for the veracity of Vernale, the state requested that the court call him as a court's witness. The court refused, and instructed the state's attorney to call Vernale as a state's witness. Counsel for the defendant moved that the court make inquiry in the absence of the jury to determine if Vernale intended to invoke his fifth amendment privilege against self-incrimination. The motion was denied and an exception was taken. The court was then informed that Vernale's counsel had advised him to claim the privilege. The state represented to the court that Vernale had made contradictory statements under oath and that it did not know what his testimony would be and that his attorney had advised the state that he did not know what his client would do if called as a witness. The court then summoned the jury. Vernale was called as a witness for the state. Under questioning by the state Vernale stated he was then at the state prison; that

he knew the defendant; that he had known the defendant for six or seven years; that his relationship with the defendant was strictly one of friendship; that he considered the defendant one of his friends and he pointed out the defendant to the court. When asked what his friendship involved, he stated he would take the Fifth Amendment on that for the simple reason I don't want to incriminate myself in any way. This is not by [sic] trial." He was then asked if he ever was an informant for the defendant. He answered he was never an informant. He was asked if he had given information on any criminal activities. He refused to answer. He was then asked: "Did you ever make a gift of a television set, a color television set to Moynahan?" He stated: "I take the Fifth Amendment on that. I don't want to incriminate myself." The state asked no further questions. The court ordered the state to reveal to the defendant evidence in its possession concerning Vernale which might be of material importance to the defense. Thereafter Vernale was cross-examined about the extent and the length of time of his friendship with the defendant; of his trip to Florida and his return with the defendant. He was then asked about his refusal to answer the question of whether he ever gave the defendant a television set. He replied: "That is right." He was then asked if he would take the fifth amendment on any inquiry about television sets and he replied in the negative and stated he was "willing to plead guilty for receiving stolen goods." He was then asked: "So you are willing to testify to some things and not to others?" He replied: "That is in my case. I do not want to incriminate myself. That is the only reason I took the Fifth Amendment." During the charge, the court gave cautionary instructions to the jury that no adverse inferences against the defendant should be drawn from Vernale's refusal to answer some questions.

The defendant objected and took an exception only to the court's refusal to interrogate Vernale in the absence of

the jury to determine if he would take the privilege. Ordinarily, the claim of error would be dismissed as no such practice is required under our procedure and would not have been efficacious in any event. *Commonwealth* v. *Martino*, Mass. , 282 N.E.2d 647. The defendant, however, did alert the court to the constitutional problems which would arise if the state was allowed to call a witness who intended to refuse to answer questions. The errors claimed in the assignments of error which are briefed are, therefore, considered. *State* v. *Vars*, 154 Conn. 255, 271-72, 224 A.2d 744.

A prosecutor or state's attorney, in a criminal case, may not call anyone who, in any capacity, has become so involved in the defendant's criminal activities as to be liable to prosecution for the same offense or for another offense growing out of the transaction from which the defendant's alleged offenses arise, with a design or purpose of extracting a claim of privilege against self-incrimination. *United States* v. *Tucker*, 267 F.2d 212 (3d Cir.); *Vandergrift* v. *State*, 237 Md. 305, 206 A.2d 250; *People* v. *Pollack*, 21 N.Y.2d 206, 234 N.E.2d 223; see note, 86 A.L.R.2d 1443-59. In considering the constitutional question presented when the prosecution questions witnesses who elect to claim the fifth amendment privilege against self-incrimination, the Supreme Court in *Namet* v. *United States*, 373 U.S. 179, 83 S. Ct. 1151, 10 L. Ed. 2d 278, noted that two factors had been focused on by trial courts to determine whether such conduct was prejudicial error. The Supreme Court pointed out that some courts found that error may be based on prosecutorial misconduct, that is, a conscious and flagrant attempt by the prosecution to build its cases out of inferences arising from use of testimonial privelege. The second theory adopted by trial courts based a finding of error on the fact that inferences from a witness' refusal to answer added critical weight to the prosecution's case

in a form not subject to cross-examination, and thus unfairly prejudiced the defendant. *Namet* v. *United States*, supra, 186-87. The court in the *Namet* case pointed out that the few claims of privilege in that case were not the only source or even the chief source of the inference of criminal activity.

That portion of the defendant's brief relating to this claim is devoted chiefly to the conduct of the state's attorney. The record does not support any inference of prosecutorial misconduct. There was full disclosure in advance of Vernale's appearance and full discussion of the merits of the issue and procedure to be followed. The state was in a dilemma in that Vernale was a witness that the state would naturally produce and one whom it had power to produce and his absence would be subject to an unfavorable inference under the rule as set forth in *Secondino* v. *New Haven Gas Co.*, 147 Conn. 672, 675, 165 A.2d 598; *Queen* v. *Gagliola*, 162 Conn. 164, 168, 292 A.2d 890; see also *United States* v. *Gernie*, 252 F.2d 664 (2d Cir.). The state revealed that it could not know to what Vernale would testify and when the witness did refuse to testify the state did not continue to seek answers involving the issue of the television set on which the witness had claimed the privilege. The state's action in the case before us was a far cry from that of the prosecution in *Douglas* v. *Alabama*, 380 U.S. 415, 85 S. Ct. 1074, 13 L. Ed. 2d 934, relied on by the defendant. The *Douglas* case involved flagrant impropriety on the part of the prosecutor who read an accomplice's confession bit by bit in the form of questions, pausing to ask the witness after each piece: "Did you make that statement?" and thereby compelling repeated reliance on the witness' claim of privilege.

Viewing the entire record, the possible inferences from Vernale's refusal to testify did not add critical weight to the state's case in a form not subject to cross-examination.

The witness' selective use of the privilege on direct examination and the extent of Vernale's testimony during cross-examination, especially when asked directly why he refused to answer, demonstrate that the state was not using Vernale's invocation of the privilege in an improper manner. Furthermore, it cannot be said here that these claims of privilege were the only source or the chief source of the inference of criminal activity. *Namet* v. *United States*, supra, 189; *United States* v. *Jenkins*, 442 F.2d 429 (5th Cir.); *United States ex rel. Fournier v. Pinto*, 408 F.2d 539 (3d Cir.), habeas corpus granted due to a combination of the prosecutor's misconduct and error in the charge. The court's cautionary charge on this issue to the jury was curative of any prejudice which might possibly have arisen because of this witness' claim of privilege. No error was committed in allowing the testimony of Vernale to the extent it was given.

After Miller had testified for the state and had identified the television set in evidence as the set he had repaired at the home of the defendant, counsel for the defendant stated he intended to cross-examine the witness "to establish a fixed motive in his mind which would be indicative of untruthfulness." Thereafter, an extensive cross-examination followed. The defendant has assigned error in six instances concerning this examination. The line of inquiry which the defedant claims he was not allowed to follow was intentionally abandoned after Miller had been questioned in the absence of the jury, and therefore the claim that cross-examination was unduly restricted is utterly without merit.

The defendant also claims that the court was in error concerning the offer of the testimony of two persons who, the defendant claimed, purchased from Miller television sets which later were discovered to have been stolen. The defendant established, while cross-examining Miller, that

in 1967 he sold two television sets which he had obtained from Vernale. One set was sold to Mr. Sterena [sic] and the other to Mr. Gaspari. The offer of proof by the defendant was that both witnesses would testify that the sets they bought from Miller were later confiscated and impounded by the police as stolen sets. The court sustained the objection by the state to such evidence on the ground that it went into collateral matters. Counsel for the defendant admitted that the offered evidence would not go to prove that Miller knew the sets were stolen, and therefore the claim that such sales were admissible on the theory of bias cannot be supported. The purpose claimed for the evidence was for negative inferences, that is, if Miller did not know the sets he obtained from Vernale were stolen, such proof would help to undermine the inference that the defendant knew the set he received was stolen. The defendant also claimed the evidence was offered to "rebut" Bishop's testimony with regard to the size of sets he had stolen. The ruling of the court was correct. "The trier has wide discretion in ruling on the relevancy of evidence. *State* v. *Towles,* 155 Conn. 516, 523, 235 A.2d 639, and cases cited. It is a reasonable exercise of judicial discretion to exclude questions which would introduce issues foreign to the case; *State* v. *Dortch,* 139 Conn. 317, 325, 93 A.2d 490; or evidence the relevancy of which appears to be so slight and inconsequential that to admit it would distract attention which should be concentrated on vital issues of the case. *State* v. *Bassett,* 151 Conn. 547, 551, 200 A.2d 473." *State* v. *Mahmood,* 158 Conn. 536, 540, 265 A.2d 83.

At the close of the direct testimony of Miller and of Vernale the defendant moved for all prior statements and investigatory inquiry testimony of these witnesses. The finding indicates that as to Miller an order was made in chambers instructing the state to turn over any matter which might be of assistance to the defendant. The record is silent with regard to the exact terms of the order or

what was turned over to the defendant. The transcript of Miller's testimony has been examined and it is silent as to any order or, if one was given, what was received pursuant to it. The state's brief indicates that it turned over to the defendant previous statements of Miller as well as relevant testimony of Miller before the investigatory inquiry. The record and the defendant's brief indicate that the state did turn over some prior statements of Miller. The order made in chambers as stated in the findings has not been challenged by either party.

As to Vernale, the court ordered the state "to disclose to Mr. Hennessey evidence in its exclusive possession which is not merely cumulative or embellishing and which may be of material importance to the defense, regardless of whether it relates to testimony given at the trial." This order apparently was grounded on the separate opinion of Justice Fortas in *Giles* v. *Maryland*, 386 U.S. 66, 98, 87 S. Ct. 793, 17 L. Ed. 2d 737, one of the three opinions making up the majority in that case. There is nothing in the record or in the defendant's claims that indicates that the state did not comply with the orders of the court as given in either instance.

On receipt of Vernale's statements made prior to trial, the defendant made a motion for mistrial or dismissal on the ground that the materials furnished were exculpatory and should have been given prior to trial when demanded by pretrial motion for disclosure. The pretrial orders were restricted to exculpatory materials only and not to such evidence which would be an aid generally to the defendant. The defendant has not pointed to any evidence which he received during the trial which tends logically to exculpate the defendant and justifies a motion to dismiss or a motion for mistrial based on the state's failure to provide exculpatory evidence under the pretrial order.

The claim that the court erred in allowing the state to determine which statements to turn over to the defendant is a more difficult question to resolve because the record does not contain a full account of the proceeding. It is evident, however, that at least as far as Vernale was concerned, the state, in compliance with the court's order, did not turn over all of Vernale's statements made prior to trial or all of his testimony before the investigatory inquiry. The defendant claims that he had a right to examine all such statements and that he, rather than the state, should make the determination from the materials of what information would aid him in his defense, and that the court should at least have made an in-camera inspection of materials claimed by the state to be exempt.

The defendant relies heavily on the case of *Dennis* v. *United States*, 384 U.S. 855, 86 S. Ct. 1840, 16 L. Ed. 2d 972. In the *Dennis* case the decision is in part based on Rule 6(e) of the Federal Rules of Criminal Procedure which grants to the trial court power to direct disclosure of grand jury testimony. See the cases collected in annotations in 3 A.L.R. Fed. 29 and 5 A.L.R.3d 819. Connecticut has no comparable rule. See the cases collected in 20 A.L.R.3d 7, involving grand juries.

Under our law an accused is not entitled to disclosure of the minutes of a constitutional grand jury proceeding merely for assistance in preparing a defense. *State* v. *Hayes*, 127 Conn. 543, 579-80, 18 A.2d 895. Where an investigatory inquiry has been made, by authority of General Statutes § 54-47, only the testimony of an accused is given to him as a matter of right. Although at the time of trial §§ 54-86(a) and (b) were in existence, we need not determine whether these sections of the statute were purely procedural in nature and therefore not binding on the Superior Court; *State Bar Assn.* v. *Connecticut Bank & Trust Co.*, 145 Conn. 222, 140 A.2d 863; because the defendant had his

own testimony taken at the inquiry by virtue of the right under § 54-47 and because the order of the court was more sweeping in favor of the defendant and was based not on the statute, but, as previously stated, followed Justice Fortas' opinion in *Giles* v. *Maryland, supra.*

As we had no rules of procedure governing discovery in criminal cases at the time this case was tried,[5] the action of the court is to be determined by the standard of due process guaranteed by the fourteenth amendment of the United States constitution as expressed in such cases as *Giles* v. *Maryland, supra, Miller* v. *Pate,* 386 U.S. 1, 87 S. Ct. 785, 17 L. Ed. 2d 690, *Brady* v. *Maryland,* 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215. While the state has an obligation not to suppress any evidence which would materially aid a defendant's case, there is nothing in the record, in the appendices or in the briefs to indicate that any such evidence was withheld or that the state did not comply with the order of the court. The heart of the holding in the *Brady* case is the prosecution's suppression of evidence in the face of a defense production request where the evidence is favorable to the accused and is material either to guilt or to punishment. Important then, are (a) suppression, (b) evidence favorable to the defense and (c) materiality. These are the standards by which the prosecution's conduct is to be measured. *Moore* v. *Illinois,* 408 U.S. 786, 794, 795, 92 S. Ct. 2562, 33 L. Ed. 2d 706. The *Brady* case does not require the prosecutor to permit the defendant to examine the prosecution's file to determine what is favorable. See *United States* v. *Evanchik,* 413 F.2d 950 (2d Cir.). While the defendant has shown that all statements of the witnesses were not given to the defense, he has not demonstrated that any favorable evidence material to issues of guilt or punishment was suppressed and has, therefore, failed to show a violation of the principle of the *Brady* case and *Napue* v. *Illinois,* 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217. Since it has not been shown that the defendant's due

[5] Chapter 22A of the Practice Book, Discovery in Criminal Cases, became effective October 1, 1972.

process rights were denied by the state's action, this court cannot base a finding of error on the unsupported speculation of the defense that materials relevant to the issues of guilt or punishment favorable to the defendant were withheld by the state and would have been discovered had an in-camera inspection by the trial court been held.

The defendant vigorously objected to and excepted to testimony offered by the state concerning acts and statements of the defendant which the state claimed were admissible as evidence tending to show a consciousness of guilt. In the absence of the jury, the state informed the court of the nature of the evidence which it proposed to present. The defendant objected and also requested that a "dry run" of the evidence be presented to the court in the absence of the jury. The court denied the request and allowed the state to proceed with its evidence. Edward Courtney, a state police sergeant, testified that on the evening of March 10, 1969, he was visited at his home by the defendant and Henry Byrnes, the chief of detectives of the Waterbury police, and that for a month prior to that date he had been assigned with a team of investigators to investigate a stolen goods ring in the city of Waterbury. He further testified that when the defendant and Byrnes arrived at his home he entered the defendant's automobile and while there was asked in a boisterous and argumentative tone by the defendant if he had said he was out "to get" the defendant. Courtney testified that he denied making the statement and that the defendant at that time was yelling and pointing his finger at Courtney. The substance of the conversation which followed was that if Courtney wanted the defendant, Courtney could have him right on the street there; the defendant stated that the state's attorney was trying to tie him with another to Vernale and to place him with a stolen television set from Vernale; the defendant further said television sets were small items and insurance companies pay off on them. The defendant also told Courtney in a loud voice that policemen should protect policemen, not persecute them; the defendant denied ever taking

anything from Vernale or anyone else and at some point in the conversation the defendant's references were to the entire Waterbury police department. During his testimony, Courtney was asked if obscenities were used by the defendant to refer to Captain Bishop and the state's attorney and Courtney stated there were and repeated them.

The state then produced two state police officers, and state's attorney Francis McDonald and his wife, to relate an incident at McDonald's home on the same evening at about 1:30 a.m. following the earlier encounter between the defendant and Courtney. McDonald testified that prior to that evening he had been present when the defendant was interviewed by Captain Bishop at which time the defendant was advised that allegations had been made that he had received stolen property from a fence, Vernale. In substance, the testimony of the state's attorney was that the defendant and Byrnes went to the state's attorney's home about 1:30 a.m. on March 11, 1969. The defendant banged on the door and awoke the McDonald family. He called to the second-floor window and stated who he was and stated he wanted to talk to McDonald. At that time he spoke in a loud, challenging, voice. McDonald called the state police. Until the police came, the pounding continued and at one time the defendant stated: "Frank, Frank, I want to talk to you. Come down. Come down, you hero, you. Come down." McDonald, his wife and three children were frightened by the episode. When the state police arrived they found the defendant and Byrnes outside the McDonald home. The defendant seemed excited and stated he wanted to talk to McDonald but that the latter, whom he referred to in obscenities, did not have the guts to talk to him. Byrnes appeared intoxicated but the defendant, although he had a moderate odor of alcohol, was able to speak clearly.

In a criminal trial, it is relevant to show the conduct of an accused, as well as any statement made by him subsequent to the alleged criminal act, which may fairly be inferred to have been influenced by the criminal act. *State* v.

Cronin, 64 Conn. 293, 304-5, 29 A. 536. The state of mind which is characterized as "guilty consciousness" or "consciousness of guilt" is strong evidence that the person is indeed guilty; 2 Wigmore, Evidence (3d Ed.) § 273; and, under proper safeguards, hereinafter discussed, is admissible evidence against an accused. *United States* v. *Friedman,* 445 F.2d 1076, 1081 (9th Cir.); *Harrell* v. *United States,* 220 F.2d 516 (5th Cir.); *State* v. *Holliday,* 159 Conn. 169, 268 A.2d 368; *State* v. *Leopold,* 110 Conn. 55, 66-67, 147 A. 118; *In re Durant,* 80 Conn. 140, 151, 67 A. 497; *State* v. *Caliendo,* 136 Me. 169, 4 A.2d 837; *State* v. *Mills,* 51 N.J. 277, 240 A.2d 1, *cert. denied,* 393 U.S. 832, 89 S. Ct. 105, 21 L. Ed. 2d 104; 1 Wharton, Criminal Evidence (12th Ed.) § 209. The defendant relies strongly on the case of *Gawn* v. *State,* 13 Ohio C.C.R. 116, 7 Ohio C. Dec. 19, for the proposition that acts or statements against a prosecutor should be inadmissible. See also 22A C.J.S., Criminal Law, § 636. In that case, however, at the time threats against the prosecutor were made, the accused had no reason to anticipate that he was to be accused and under those conditions his threats could not be a manifestation of a "consciousness of guilt." Note, 8 A.L.R. 1361. In addition, the threats in the *Gawn* case were an attempt to prevent prosecution of another individual not the defendant in the case.

The defendant argues that he was not under arrest and that his acts and statements were mostly an argument with a police officer and a desire to get an investigation moving rather than to suppress it. Without repeating the recital of facts previously stated, it is clear that such evidence would indicate a "consciousness of guilt," since the defendant knew at the time that the investigation was centered on his activities and on himself. Furthermore, the defendant was given every opportunity to present his version of the incident to the jury which simply did not accept his explanation of the nocturnal visitation.

Before evidence is allowed to be given, however, the court must also consider whether its prejudicial tendency outweighs its probative value. *State* v. *Marquez,* 160 Conn. 47, 52, 273 A.2d 689; *State* v. *Johnson,* 160 Conn. 28, 33, 273 A.2d 702; *State* v. *Holliday, supra,* 173. Not only was evidence given which could be interpreted as an effort on the part of the defendant to influence the state's attorney, but evidence was also given as to the effect of the defendant's conduct on the wife and children of the state's attorney. If such evidence had no probative force or was of inconsequential value to the state in the proof of the defendant's guilt, then, of course, it should not have been admitted because of its prejudicial effect. In view, however, of the defendant's claim that his acts and statements did not constitute conduct evincing consciousness of guilt, the state was justified in showing the actual statements made, the manner in which they were made and the intensity and duration of the acts. The effect of these actions on the persons he reasonably could expect would be affected was relevant to show the manner, intensity and duration of such conduct, all of which tended to show the defendant's state of mind, that is, his consciousness of guilt. This evidence was also reasonably necessary since the only direct evidence of the defendant's guilt was testimony of a felon whose veracity could be questioned and subjected to disbelief by a jury. Balancing this probative value against any prejudicial effect the evidence might have had, the court was not in error in allowing the state to produce this evidence. McCormick, Evidence § 157, pp. 332-33; 6 Wigmore, Evidence (3d Ed.) § 1904; 1 Wharton, Criminal Evidence (12th Ed.) § 151; see also *State* v. *Holliday,* 159 Conn. 169, 173, 268 A.2d 368.; *Thibodeau* v. *Connecticut Co.,* 139 Conn. 9, 14, 89 A.2d 223.

The defendant claims error in the court's ruling during the cross-examination of Timothy Moynahan, the defendant's son, which admitted evidence concerning his arrest as proof of bias, interest and motive. A claim of error in

the admission of evidence is to be tested by the finding. Practice Book § 648; *State* v. *Harris*, 147 Conn. 589, 599, 164 A.2d 399; *Facey* v. *Merkle*, 146 Conn. 129, 131, 148 A.2d 261. The defendant's son testified in his father's behalf. He further testified that he had represented Vernale from 1965 to 1968. During the presentation of the state's case evidence was offered to establish that the defendant's son, Timothy, had received a stolen air conditioner from Vernale. The witness stated that in August, 1967, he opened an office in Watertown and Vernale gave him an air conditioner. In February, 1969, when he first learned it had been stolen, he immediately told the state's attorney and the air conditioner was removed from his office by the state police the next day. On cross-examination Timothy Moynahan was asked: "Attorney Moynahan, is it true that you presently have pending against you in this particular court an information charging you with conspiracy with your father to receive stolen goods?" The state claimed the admissibility of this evidence on the basis of interest, motive and bias, "particularly as there are charges pending from the very same investigation."

The defendant objected on the grounds that (1) the rules governing the right of the defense to cross-examine a state witness are not applicable to the state's claim of right to cross-examine a defense witness; (2) such evidence was not relevant to any issue of bias, interest or motive; and (3) the attempt was to impeach the witness' testimony by attacking credibility through the impermissible vehicle of proof of arrest without a conviction.

The defendant's claim that the scope of cross-examination of defense witnesses is more restricted than the scope of cross-examination of witnesses for the prosecution is without merit. Rules governing the admissibility of evidence are with few exceptions the same for the trial of civil and criminal cases. *State* v. *Parker*, 112 Conn. 39, 54, 151 A. 325; *State* v. *Willis*, 71 Conn. 293, 306, 41 A. 820; 1 Wig-

more, Evidence (3d Ed). § 4 (2); 58 Am. Jur., Witnesses, §§ 611, 616. The right, extent of, and limitation on cross-examination generally was well stated in *Fahey* v. *Clark,* 125 Conn. 44, 3 A.2d 313; see also *Fordiani's Petition,* 99 Conn. 551, 561, 121 A. 796. In *State* v. *Griswold,* 67 Conn. 290, 307, 34 A. 1046, commenting particularly on an accused taking the stand in a criminal case in his own behalf, this court noted that by taking the stand the accused "subjected himself to the same rules, and was called upon to submit to the same tests which could by law be applied to other witnesses. . . . Having elected to become a witness in his own behalf, he occupied for the time being the position of any other witness, with all its duties and obligations." See also *People* v. *Shapiro,* 308 N.Y. 453, 126 N.E.2d 559; 58 Am. Jur., Witnesses, §§ 611, 616. This reasoning must apply as well to witnesses who testify for the defendant.

The two remaining claims, that the evidence was not relevant to any issue of bias, interest or motive and that a witness' testimony may not be impeached by proof of an arrest without conviction, are discussed together.

Evidence of a conviction of a crime where punishment may be more than a one-year-term of imprisonment is admissible in evidence to affect credibility. *Heating Acceptance Corporation* v. *Patterson,* 152 Conn. 467, 472, 208 A.2d 341. Evidence of arrest without conviction, however, is not admissible as evidence to attack the credibility of a witness. *Hayward* v. *Maroney,* 86 Conn. 261, 262, 85 A. 379; *Card* v. *Foot,* 57 Conn. 427, 432, 18 A. 713; see the cases collected in note, 20 A.L.R.2d 1421, 1425 § 3. The offer of evidence that the witness had been arrested was not for the purpose of attacking his credibility, but to show bias, interest and motive. The right to show bias, interest or motive was clearly enunciated in *State* v. *Luzzi,* 147 Conn. 40, 46, 156 A.2d 505, wherein it was stated: "Cross-examination to elicit facts which tend to show motive, interest, bias or prejudice is a matter of right, and although the extent of such cross-

examination may often rest in the sound discretion of the court, a denial of the right, or its undue restriction, will constitute reversible error. . . . It is generally held that cross-examination for this purpose is a substantial legal right which may not be abrogated or abridged at the discretion of the court to the prejudice of the cross-examining party."

In *United States* v. *Dardi,* 330 F.2d 316 (2d Cir.), cert. denied, 379 U.S. 845, 85 S. Ct. 50, 13 L. Ed. 2d 50, it was stated: "While an arrest alone is not normally admissible to impair the credibility of a witness, the fact that it might embitter him so as to motivate him to testify as he has may be relevant." In *People* v. *Barr,* 51 Ill. 2d 50, 280 N.E.2d 708, it is stated: "[T]he fact that a witness has been arrested or charged with a crime may be shown or inquired into where it would reasonably tend to indicate that his testimony might be influenced by interest, bias or a motive to testify falsely." *People* v. *Mason,* 28 Ill. 2d 396, 401, 192 N.E2d 835; see also *Ford* v. *Kremer,* Mass. , 277 N.E.2d 679.

In *Hayward* v. *Maroney,* supra, relied on by the defendant, it was held that the arrest of the plaintiff was not admissible to show bias. An examination of the record and briefs, however, demonstrates that in offering the evidence of the arrest, "[i]t was not stated in what connection any motive or bias was intended to be shown." 124 Rec. & Briefs, p. 298. In *State* v. *Tropiano,* 158 Conn. 412, 426, 262 A.2d 147, cert. denied, 398 U.S. 949, 90 S. Ct. 1866, 26 L. Ed. 2d 288, it is indicated that evidence of the not guilty plea of a witness and his subsequent sentencing were matters which were admissible on the ground of motive, interest or bias and it was error on the part of the court to exclude such evidence.

In the present case, Timothy Moynahan was arrested and charged as a coconspirator with his father stemming from the same investigation and involving the same type of criminal behavior and the same informant. Under such circumstances the state had the right to cross-examine him to show whatever bias, interest or prejudice he might have regarding the case. 3 Wigmore, Evidence §§ 949, 967 (Chadbourn Rev., 1970); 58 Am. Jur., Witnesses, § 755; note, 20 A.L.R.2d 1421, 1440 § 7, 1446 § 12. Of course, the effect of such evidence in determining whether the witness was in fact biased or had a motive to falsify his testimony would be for the consideration of the jury. It was for the court to determine whether the prejudicial effect of this evidence would outweigh its probative value. The court did not abuse its discretion in the ruling. *State* v. *Marquez,* 160 Conn. 47, 52, 273 A.2d 689; *State* v. *Johnson,* 160 Conn. 28, 33, 273 A.2d 702.

During the cross-examination of Timothy Moynahan the state brought out that on one occasion he represented Lieutenant Griffin in a negligence suit against Vernale. While this claim was pending he also represented Vernale in a criminal action. The state then interrogated Timothy Moynahan about the canons of professional ethics and particularly Canon 6. Practice Book, p. 4. He was asked if, in his opinion, he violated the canon. The court permitted this question as related to the representation of Vernale. Assuming without deciding that a violation of Canon 6 would not tend to indicate a lack of veracity, the court's action in allowing this limited inquiry was at most harmless error. If the record discloses that the ruling could not reasonably have affected the verdict, it is not harmful and hence not reversible error. *State* v. *Tropiano,* supra; *DeCarufel* v. *Colonial Trust Co.,* 143 Conn. 18, 21, 118 A.2d 798. Examination of the record clearly establishes that defense counsel stated that the inquiry was a legal interpretation of Canon 6 and that there were "a number of legal opinions with respect to the interpretation

of Canon 6 in the particular situation that Mr. Gaffney is inquiring into" and the witness emphatically denied the claim that his conduct violated Canon 6 and no further inquiry was made by the state. It is clear that this evidence was not so prejudicial to the defendant as to affect the verdict. *State* v. *Tropiano,* supra. Further, the record does not show that an exception was taken to the questions. This alone would be dispositive of this assignment of error. *LaVoie* v. *Marshall,* 141 Conn. 681, 688, 109 A.2d 508.

IV

The final claim of the defendant is that the court erred in denying his motion for judgment notwithstanding the verdict because the verdict was not supported by the evidence. This claim is tested by the evidence that appears in the appendices to the briefs. *State* v. *Cofone,* 164 Conn. (34 Conn. L.J., No. 25, pp. 1, 2); *State* v. *Cari,* 163 Conn. 174, A.2d . The appendices not only support the evidence included in the finding but are more extensive. There is no need to repeat the evidence printed in the appendices since the state's claims of proof in the finding are all repeated in the appendices and, if believed by the jury, justified their verdict. It is apparent that there could not have been any serious controversy as to the fact that the described television set was stolen or of its value. The testimony relating to whether the defendant knowingly received and concealed a stolen television set was in direct conflict. From the evidence printed in the appendices, as previously recited, it is apparent that the jury, in the rightful exercise of their province in making reasonable inferences and on passing upon the crediblity of witnesses, including that of the defendant, could have found against the defendant. The evidence offered in this case supported the jury's verdict.

There is no error.

In this opinion the other judges concurred.

Letter of Harold J. Ivey, Clerk, Dated May 25, 1973

STATE OF CONNECTICUT

SUPREME COURT

New Haven, Conn.

May 25, 1973

Edward F. Hennessey
Attorney-at-Law

Please take notice that the Supreme Court has decided the following motion:

#7032 State of Connecticut vs. Paul C. Moynahan

"May 23, 1973. The defendant's motion to reargue is denied. By the Court, House, Chief Justice."

Harold J. Ivey, Clerk

Letter of Francis J. Drumm, Jr., Administrative Assistant, Dated May 23, 1973

SUPREME COURT OF CONNECTICUT

OFFICE OF THE REPORTER OF JUDICIAL DECISIONS

DONALD H. DOWLING — Box 1850
Reporter of Judicial Decisions — Hartford 06101

23 May 1973

Francis J. Butler, Esq.
Clerk, Superior Court
District of Waterbury
7 Kendrick Avenue

Waterbury, Connecticut 06702

Re: State v. Moynahan

Dear Attorney Butler:

Enclosed is an "Amendment to Opinion" in the captioned case. A certified copy of this opinion was mailed by us to your office on Monday, 23 April 1973.

Very truly yours,

Francis J. Drumm, Jr.
Administrative Assistant

FJD/gaf
Encl

cc: Edward F. Hennessey, Esq.
Dennis F. Gaffney, Esq.
Harold J. Ivey, Esq.

Amendment to Opinion

SUPREME COURT OF ERRORS

JANUARY TERM, 1973

STATE OF CONNECTICUT v. PAUL MOYNAHAN

Amendment To Opinion

In the thirtieth paragraph under section III of the opinion beginning, "During the cross-examination of Timothy Moynahan . . . ." delete the following sentence: "Further, the record does not show that an exception was taken to the questions. This alone would be dispositive of this assignment of error. *LaVoie* v. *Marshall*, 141 Conn. 681, 688, 109 A.2d 508."

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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-238

PAUL C. MOYNAHAN,

Petitioner,

—v.—

STATE OF CONNECTICUT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

APPENDIX TO PETITIONER'S PETITION FOR CERTIORARI

EDWARD F. HENNESSEY
JAMES A. WADE
799 Main Street
Hartford, Connecticut 06103
Attorneys for Petitioner

INDEX TO APPENDIX

Portions of State Supreme Court Record and Appendix submitted in support of:

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1. With Respect to Questions Sought to be Reviewed, No. 1:

a. Excerpt from State Supreme Court Record:

"273. . . .

The State offered as its witness Charles Vernale and the following occurred:

Mr. Gaffney: The next witness to be called is Mr. Vernale. His name has been mentioned. However, the State does not feel it could vouch for the veracity of this gentleman, and would ask the court to call him as the court's witness.

There is some authority for it, your Honor, and I would ask that this take place.

Mr. Hennessey: I think, your Honor, maybe we are going to have to ask that the jury be excused again.

The Court: I am afraid so.

(Jury excused)

Mr. Hennessey: Might I state, your Honor, maybe this time, but there is presently in court here Mr. Carolan. Mr. Carolan is the public defender appointed by Judge Barber, and is currently representing Mr. Vernale with respect to these charges.

The Court: The question before the court now is whether or not the court should call Mr. Vernale. I don't believe that this should be done at this time.

It seems to me that you have a right to put Mr. Vernale on the stand and call him as a State's witness, and if he proves to be hostile, then, of course, you have your rights, as you well know.

Mr. Gaffney: Excuse me, your Honor. I am not claiming him as a hostile witness. He had made contradictory statements under oath on various occasions, so, frankly, we cannot vouch for his veracity.

With Respect to Questions Sought to be Reviewed, No. 1

As I understand the Connecticut law, a side calling a particular party must vouch for his veracity. It is the common practice in the Federal Court to call the witness as a court's witness since he is a necessary witness to the case.

The Court: Is there objection on your part, Mr. Hennessey, to having Mr. Vernale called as a court's witness?

Mr. Hennessey: Well, I would like to say this, your Honor: Before he is brought in front of this jury, I would like it clear in the record that I did not want this man brought in in front of this jury until it has been clearly ascertained in the absence of that jury whether or not he should be permitted to testify, one; two, whether or not he intends to invoke the Fifth Amendment.

I think it would be grossly prejudicial to permit a witness to take the stand and now, in a sense, the burden is being put on the court to call him.

And then, your Honor calls him and he invokes the Fifth Amendment in the presence of the jury. This is extremely prejudicial to us.

The Court: Well, Mr. Carolan is here representing Mr. Vernale.

Mr. Hennessey: I don't know if your Honor wants to address Mr. Carolan directly with respect to his feeling. I should say this, your Honor: It is my understanding, and certainly I am sure the State has not talked to Mr. Vernale in the absence of Mr. Carolan. I would hope not, since they would not have any right to do that under the canons at this point.

I am sure of what Mr. Carolan has told me what his advice would be, since Mr. Vernale is charged in, I understand what was originally a two-count information in which Mr.

With Respect to Questions Sought to be Reviewed, No. 1

Moynahan was being charged with being a co-conspirator with Mr. Vernale.

That charge, as I understand it, and other charges relating to all these transactions that have been opened up, are cases pending in this court, and therefore, it is obvious that Mr. Vernale's rights would be seriously prejudiced if any inquiry were made.

The Court: But, Mr. Hennessey, you don't have the right to make these claims. You, as counsel for Mr. Moynahan, have no standing to make any claims with reference to whatever rights Mr. Vernale has.

Mr. Hennessey: Well, let me try to explain. I keep going back and forth over the thing.

I am not concerned about Mr. Vernale, your Honor. I am concerned about Mr. Moynahan (Record, pp. 125-7).

Well, just as I was concerned about Mr. Moynahan when the Court saw fit to protect Mr. Miller, to limit my examination of Mr. Miller to the point where I could not make any inquiry. Further, the Court felt sufficiently disposed to protect Mr. Bishop so that I was prohibited from asking questions that might tend to raise my inquiry which would protect my client's rights that I was asking Mr. Bishop in the beginning about.

The Court: I don't see where that has anything to do with the issue at hand, Mr. Hennessey.

Your right of cross-examination of either of the two gentlemen you mentioned was not limited beyond what I thought were unreasonable limits.

Now, it seems to me that the comment that you make is a very improper one.

Mr. Hennessey: If it is improper, I apologize. I don't intend it to be so.

With Respect to Questions Sought to be Reviewed, No. 1

The Court: It is the duty of the Court to make rules on evidence and to what limits you may go on cross-examination, and it is the opinion of this Court that you were given every latitude possible on cross-examination within reasonable limits.

Mr. Hennessey: I am not questioning your Honor's rulings.

The Court: I don't think your remarks at this time are proper.

Mr. Hennessey: If that is so, I apologize. My point was not to question your Honor's rulings. I understand that that is your Honor's function, and your Honor has so ruled.

The thing that I am expressing to your Honor is that when Mr. Bishop was here the concern was that Mr. Bishop might be asked questions—

The Court: Mr. Hennessey, you have no right to be concerned with Mr. Vernale's rights. That is not your function as defense counsel for Mr. Moynahan. You have no standing to even make these comments to the Court.

Mr. Hennessey: Well, excuse me, your Honor, I would submit with all due respect, that I do have standing to make comments with respect to a witness sought to be tendered by the State.

The Court: The State has a right to call anybody. The State has a right to call you. The State has a right to call me as a witness, if necessary.

You have no rights there.

* * * * *

The Court: We will take a short recess, Sheriff.

With Respect to Questions Sought to be Reviewed, No. 1

(Court resumed — still in the absence of the jury):

The Court: Gentlemen, I am not completely satisfied that a pre-trial or what we call a dry run of Mr. Vernale's position in this case is proper. If you gentlemen agree that it should be done, I will accede to that request.

Mr. Gaffney: The State does not agree.

The Court: The State does not?

Mr. Gaffney: No, sir, as I understand the line of cases, it does not concern this particular situation.

Mr. Hennessey: I have already made my motion, your Honor, and your Honor has denied it. And just for the record, I have furnished your Honor a line of cases cited, I believe, in 86 A.L.R.2d, 1443, and those cases subsequently decided in the supplement, including the De GeSualdo case, and cases showing to support me, so that your Honor will know on the record that my claim is based on what I believe to be a line of case law in support of that position (Record, pp. 35-7).

* * * * *

Mr. Hennessey: I am claiming, your Honor, that if the State calls a witness with any forewarning that this witness is going to invoke the Fifth Amendment in front of the jury, then I would submit that this would be prejudicial.

The Court: The State has a right to call the witness. If Mr. Vernale wants to invoke the Fifth Amendment, that is up to Mr. Vernale. Then the court must make a determination as to whether or not he must answer. But the regular procedure is that the State has a right to call any witness it sees fit.

Mr. Hennessey: Well, I am expressing that as a ground of objection, your Honor, and in making a request that your Honor make inquiry in the absence of the jury to determine whether or not such an invocation of the Fifth Amendment

is going to be made, so that it will not occur in the presence of the jury. That is, I make that motion, your Honor.

The Court: Your motion is overruled.

Mr. Hennessey: Exception, your Honor.

The Court: Exception may be noted.

Following this ruling and while still in the absence of the jury, the following occurred:

The Court: . . . Now, gentlemen, do you claim that the court has a right to call this witness?

Mr. Gaffney: Yes, sir.

The Court: I would like to see some authority on that. I am not aware of it.

Mr. Gaffney: Well, if the court please, I think the general authority is that a party must vouch for the veracity of its witnesses. In other words, we must vouch for the truthfullness of Mr. Vernale if we call him, and frankly we cannot do that, and we represent that to the court.

The Court: You don't even know if he is going to balk as a witness?

Mr. Gaffney: No, I don't know.

The Court: You don't know if he is going to testify friendly?

Mr. Gaffney: That is correct.

The Court: Or be hostile, or is going to invoke his privilege?

Mr. Hennessey: I did want to make it clear that my information is that the advice of Mr. Vernale's attorney to Mr. Vernale will be to invoke his privilege against self-incrimination. And it appears from the fact that the State

With Respect to Questions Sought to be Reviewed, No. 1

has expressed this prior concern, is an indication to me that they have at least a belief that he may do this, or he may not.

* * * * *

The Court: Well, the public defender is here to protect Mr. Vernale's rights.

I am going to summon the jury into the courtroom, gentlemen, and ask you to call any witness you intend to call, and then we will proceed from there. . . .

Mr. Hennessey: Excuse me. Could I state so as to make the record clear, your Honor, I apologize for being so lengthy, but my position is that your Honor's references to the invocation of the Fifth Amendment and subsequent use of statements is, as I recognize, covered by the case of *Pointer* vs. *Texas*, 380 U.S., which deals with the Sixth Amendment, the right of confrontation of the defendant.

I am likewise invoking the Fourteenth Amendment and due process rights of a defendant in claiming that in a situation where the court has a forewarning of the intention of a person who is related to the transaction, who is or was a co-indictee or is mentioned as a participant in the crime that is involved, that when that situation arises, and further, where it is clear on the record that the man has a valid reason for invoking the privilege in that he is presently under arrest and charged with crimes related to the very situation that is in issue here, that under those circumstances it is my position that the court should make an inquiry in advance, in the absence of the jury, to make the determination as to whether or not this privilege is to be invoked, since the invocation of this privilege in the presence of the jury would constitute prejudicial error, and I claim it under the Fourteenth Amendment.

The Court: The only question before me is whether or not the State has a right to call Mr. Vernale as a witness. It would seem to me that the State does have that right.

Now, what happens from that point on is a matter to be determined depending upon his answers.

Now, that is the way the court feels at the moment, unless you could show me otherwise.

Mr. Gaffney represents to the court that they have no way of knowing what his position is going to be, and in view of that representation I don't see why we should proceed in any other different fashion.

Summon the jury.

Thereafter, in the presence of the jury, the following occurred during the testimony offered by the State:

Charles Vernale identified himself as being in State's Prison where he has been for 13 months. He stated that he had known Paul Moynahan for 6 or 7 years and that their relation was one of strict friendship. There followed the following questions:

Q. And tell the ladies and gentlemen of the jury something about your friendship. What did it involve or entail, for example? A. I would like to take the Fifth Amendment on that for the simple reason I don't want to incriminate myself in any way. This is not my trial.

Q. All right. Were you ever an informant for Mr. Moynahan? A. Never, I was never an informer.

Q. Did you ever give him any information of any kind concerning criminal activities? A. I take the Fifth Amendment on that. I don't want to incriminate myself in any way, also.

Q. Did you ever make a gift of a television set, a color television set to Mr. Moynahan? A. I take the Fifth Amendment on that. I don't want to incriminate myself.

The Court: At this point the jury is excused.

With Respect to Questions Sought to be Reviewed, No. 1

Gentlemen, I shall take a short recess at this point and ask the guards here to return Mr. Vernale downstairs until I resume court.

Short recess, Sheriff.

(Recess)

(Court resumed)

The Court: All right, you may proceed, Mr. Secor.

Direct examination by Mr. Secor:

Mr. Secor: Under the circumstances, we have nothing further of this witness" (Record, pp. 127-31).

b. Excerpt from Defendant's State Supreme Court Appendix:

" ARGUMENT OF THE STATE

* * * * *

REBUTTAL ARGUMENT

* * * "And Charles Vernale was asked, 'Did you give the defendant, Paul Moynahan a color television set? Did you deliver it to him?' And he took the Fifth Amendment. He is not a very great guy" (T. 1969). * * *" (Appendix, p. 32a).

c. Excerpt from State Supreme Court Record:

" ASSIGNMENT OF ERRORS

The Court erred:

* * * * *

23. In rejecting the defendant's motion for voir dire examination and in admitting the testimony of Charles Vernale as set forth in paragraph 273 of the finding" (Record, pp. 215, 219).

2. With Respect to Questions Sought to be Reviewed, No. 2:

a. Excerpt from State Supreme Court Record:

"294. The State offered as its witness, Edward Miller, ... Thereafter in the absence of the jury the following occurred:

The Court: All right. Now gentlemen, with respect to the issue as to what length defendants may go in the cross-examination of Mr. Miller, I would like to hear Mr. Hennessey first.

Mr. Hennessey: We would seek to cross-examine Mr. Miller to establish a fixed motive in his mind which would be indicative of untruthfulness. The motive which we would seek to establish is that Mr. Miller, during the course of the one-man Grand Jury investigation that was conducted here in Waterbury with respect to one single claim which is some form of a conspiracy to steal and sell stolen color television sets was in fact himself investigated by this Grand Jury with respect to his transactions with stolen color television sets. And that inquiry was made not merely of him as an independent witness to possibly testify as to some facts relevant to this case, but also that he was focused on as a potential accused, because of the fact that evidence was available to the police which would indicate that he was a seller of television sets himself, which sets were subsequently determined to be stolen.

We know from our own investigation of three instances where Mr. Miller sold stolen color television sets to individuals in the Waterbury area, Mr. Stevens, Mr. Gaspari and Mr. Lanza. It is our understanding as well that one of these gentlemen at least, was subsequently charged by the State's Attorney's office with the crime of receiving stolen goods, based upon the fact that he did receive a stolen color TV set from Mr. Miller.

With Respect to Questions Sought to be Reviewed, No. 2

However, to the best of our knowledge, Mr. Miller was not charged, although he, in fact, was the seller.

* * * * *

We place great emphasis in our own minds upon the testimony of Mr. Miller since standing at present un-cross-examined as he is, he would appear to a jury to be merely a man involved in the repair of television sets who did in fact at the behest of the individual, Mr. Moynahan, go to that home and repair this particular set, and so identifies it.

It therefore becomes crucial evidence as to the question of whether or not this set was ever in fact in Mr. Moynahan's home.

* * * * *

But the point that I tried to make is that where evidence exists which would establish a fixed motive in the mind of a person to lie or possibly to testify for the State that such motive can be developed through proper evidence to establish that he would have a reason for testifying as he does. The reason we would submit here is that Mr. Miller is concerned over his own career and his own life, and that he does not want to be charged, even though there is evidence to establish that he was in fact a recipient and a subsequent seller for money of stolen sets.

* * * * *

(Record, pp. 202-4).

We would claim that the law in this area is set forth first in relying for basic text, Wigmore on Evidence, Section 967. This basic section deals with testimony of accomplices and co-indictees in a criminal case.

The basic doctrine applies to numerous cases involving such situations where a witness is put on the stand and then on cross-examination evidence is sought to be elicited to show that by reason of some threat of criminal sanction

or some pending criminal matter, he would have a motive to lie.

* * * * *

Mr. Hennessey: In the pocket supplement addenda to 967 was added, and the note is relevant here: 'Apart from accomplices and co-indictees, a witness in a criminal case, as well as in a civil case, may have a motive to testify falsely about a particular matter. No useful purpose would be served in undertaking to enumerate even some of the innumerable motives that may exist. Suffice it to say that evidence of such motive is to be distinguished from that which merely tends to discredit the witness generally.'

* * * * *

Mr. Hennessey: These are cited in the note, *United States* vs. *Lester*, 248 F.2d 329; *United States* vs. *Masino*, 275 F.2d 129; also, a Second Circuit case, and in particular, *People* vs. *Mason*, which is a 1963 Illinois case, 281 Illinois 2d 396, and a citation which is available in this library, 192 N.E. 2d 835.

The Court: Those are pretty old cases.

* * * * *

'However, showing interest or bias on the part of a witness is also an accepted method of impeachment, and even in jurisdictions where evidence of arrest or indictment is not ordinarily admissible to impeach credibility generally, the fact that a witness has been arrested or charged with a crime may be shown or inquired into where it would reasonably tend to show that his testimony might be influenced by interest, bias, or a motive to testify falsely.'

The Court: Well, I think I heard a statement here this morning to the effect that Mr. Miller had not been arrested nor had he been indicted.

Is that so, Mr. Secor?

Mr. Hennessey: I don't know. I would have to defer to the State on that.

Mr. Secor: This is correct.

* * * * *

The Court: How far can you go to cross-examine him, say, where there is a potential arrest where his Constitutional rights may be infringed upon?

Mr. Hennessey: Well, the issue is this, your Honor: I believe that the question of Mr. Miller's Constitutional rights are a matter of concern to him, not to me. If Mr. Miller is asked a relevant admissible question, the answer of which might infringe upon his Constitutional rights, then the Constitution does not compel him to answer it. This is not the same thing as prohibiting an advocate from asking.

The Court: That is where the court's concern is.

Mr. Hennessey: And Mr. Miller's concern comes into play, not that I should be precluded from asking him, but rather should he be protected from answering, if, in fact, he chooses to stand on his Fifth Amendment rights by reason of the fact that he feels such an answer would tend to incriminate him. That is his right, and he has a right to invoke it and I certainly gainsay but that is not the same thing as my right to cross-examine him (Record, pp. 204-5).

* * * * *

The case of Masino, which is in 275 F.2d, also, I believe, tries to articulate the distinction which I am attempting to draw maybe inarticulately, which is that the question of cross-examination and the latitude allowed to the lawyer in the defense of criminal accused, is extremely broad, that it is, I think, if any weight is going to be given to one side or another, the weight would lie in favor of the defendant in a criminal case.

With Respect to Questions Sought to be Reviewed, No. 2

I will read from a Connecticut decision pertinent to that point.

The issue in the Masino case indicated the question of an inquiry about charges that were dropped after a man took a plea, and those were excluded, and the Courts holding that was prejudicial error, also indicated that such evidence was admissible when the basic question is of possible motive to falsify his testimony. And they pointed out that the distinction is not whether or not someone is trying to get in an arrest, but rather whether or not the evidence merely of arrest would be such as to indicate motive on the part of a person.

The right of cross-examination has been recognized in Connecticut most recently in the case of *State* vs. *Luzzi*. I will withdraw that. That is not accurate. It has not been recognized most recently, but the point which I am trying to stress was probably stated best in *State* vs. *Luzzi*, which is 147 Conn. 40, a 1959 decision.

* * * * *

. . . . the Court pointed out: "Cross-examination to elicit facts which tend to show motive, interest, bias, or prejudice is a matter of right, and although the extent of such cross-examination may often rest in the sound discretion of the Court, a denial of the right, or its undue restriction, will constitute reversible error."

* * * * *

'It is generally held that cross-examination for this purpose is a substantial legal right which may not be abrogated or abridged at the discretion of the Court to the prejudice of the cross-examining party.'

* * * * *

The question merely is whether or not the defendant is given an ample opportunity to develop, through cross-examination, those aspects of this person's knowledge which

would be crucial, in our opinion, crucial to the establishment and placing of Mr. Miller in his proper perspective in this entire transaction, so that this jury will not walk away merely with the idea that, well, this is Mr. Miller who is a TV repairman, and went in there. Why would he lie? He is not even involved in the case. Because we certainly submit that he is involved, or that the Grand Jury had established enough evidence to show his involvement (Record, pp. 25-30).

* * * * *

Mr. Gaffney: I would answer assuredly, Your Honor, the mere fact that he had been arrested would not therefore be admissible. We are going even further, as your Honor noted, that we don't even have an arrest in this case. We have a suspicion, if that be the testimony before a Grand Jury, and clearly the State would argue that this matter also would be inadmissible in order to impeach the credibility of this witness, your Honor.

I think, if the court please, and recalls the testimony of Mr. Miller presented this morning, it was of a very limited scope. He was confined solely, as counsel will relate, solely to the repair of a TV, and it is in the defendant's home, and it was confined to that, with that particular purpose in mind. Granted the scope of the inquiry of the Grand Jury was much broader in respect to Mr. Miller, but this does not affect this particular defendant, and the State would object to it.

The Court: Do you agree, Mr. Gaffney, questions relating to motive, bias, prejudice, design, on the part of a witness would be properly admissible on cross-examination?

Mr. Gaffney: No question, sir.

The Court: Even though they may be unrelated to the direct testimony, they are still admissible to affect the credibility of his testimony?

With Respect to Questions Sought to be Reviewed, No. 2

Mr. Gaffney: Yes. However, the State would argue that an arrest or mere suspicion does not mean interest or bias with regard to a witness on the stand.

The Court: All right. Anything else, gentlemen? (Record, p. 205).

* * * * *

Mr. Hennessey: I would be glad to state I would like to know whether or not Mr. Miller was friendly with Mr. Vernale since when this case started Mr. Vernale's name was only incidental, but through Mr. Bishop I think his name has clearly been inserted into the case and is obvious.

There can be no doubt in the jury's mind, I don't think, that Mr. Vernale was running a place up in his garage where TV sets were going in and out.

If that part of Mr. Bishop's testimony is believed, it has been injected and it is in the minds of the jury.

I would like to inquire from Mr. Miller as to his business dealings with Mr. Vernale. I would like to determine, for example, whether or not some of the stolen television sets which were subsequently resold by him did not in fact come from Mr. Vernale. I have tried through two TV men, merely in anticipation of Mr. Miller's arrival, to show how a legitimate dealer in television sets gets his television sets and how he gets documentation of it. And part of the reason I brought that out through Mr. DeMartin and Mr. DeCaprio was to show how reputable businessmen work, how they deal in sets, and to show that Mr. Miller's transactions were somewhat different, such that he was placed under suspicion, that he was questioned.

That, I think the man, frankly, whether or not the State has elected to take action against him as yet does not preclude the fact that they may.

I don't know what the State's Attorney in this county does or does not do. I do know we have already seen, I

think, some indication through Mr. Bishop that Mr. Bishop was here waiting seven months to be sentenced which I cannot honestly believe was the fault of his attorney or the Court or any intention to leave Mr. Bishop languishing in the Montville Jail.

I think that it was done by the State's Attorney because of their intention to use him in this case and determine, based upon his cooperation in this case, what punishment he is entitled to.

Now, I think, also, the case law as shown, and I think cases are cited in Wigmore to make it clear that evidence of that type is clearly admissible where you have a man such as Mr. Bishop on the stand.

We are only drawing a slight degree between Mr. Bishop and Mr. Miller. Mr. Bishop admits to a lot of things, but I think the point is that the cross-examination that I understood of him was intended partly to show that there were reasons.

I think if I have proper time to give your Honor cases which would show that a charge to the jury that a man has not been sentenced is a matter to be considered by the jury in weighing his testimony.

Now, I only point that out because, as I understand the way the State's Attorney's Office operates in this county, and it is not that more unusual than other counties, such as New Haven. They decide who gets arrested, and I think that was so in this case. I think they made the decision as to who got arrested and who got charged, and who did not.

I think it is clear to me, and I think the State would have to admit they knew Mr. Bishop had confessed to a lot of things that he was not charged with, and I think in candor that I can state that he is not going to be charged now, because I think he has paid his bill.

With Respect to Questions Sought to be Reviewed, No. 2

So, whether or not Mr. Miller has been charged here, I don't think is the sole criterion. The fact that he was under investigation, the fact that he was implicated, and the fact that he very well could be charged after this case is all over, I think is germane. (Record, pp. 31-3).

* * * * *

Thereafter the Court directed the defendant to conduct a voir dire in the absence of the jury, at which time the following occurred.

Q. And at any subsequent time after that first inquiry, were you told by any member of the police, or any member of the State's Attorney's office that you were under investigation?

* * * * *

Mr. Gaffney: Objection.

The Court: The objection is sustained and the answer may go out. The question is excluded (Record, p. 206).

297. Q. All right. When you obtained the sets from Mr. Vernale did you receive any invoices?

Mr. Gaffney: I object, your Honor.

The Court: Yes, we are going far afield now. I will sustain the objection (Record, p. 208).

* * * * *

200. "Mr. Hennessey: Well, I asked the question, did I not, about the price, and if I am correct, your Honor sustained the objection to my question as to how much he paid Mr. Vernale for those two sets?

The Court: Yes, I think I sustained the objection to that question."

Thereafter the following ruling was made by the Court:

"Mr. Hennessey: But I would only ask that you permit me to have those portions of those questions which we have asked here be presented to the Court as an offer of proof.

With Respect to Questions Sought to be Reviewed, No. 2

The Court: Any objection to that?

Mr. Gaffney: No objection.

The Court: Very well. It is so ordered.

Mr. Hennessey: And so that the record would be clear, I then take exception to your denial of permitting me to introduce those few questions.

The Court: Exception may be noted" (Record, p. 34).

b. Excerpt from State Supreme Court Record:

"292 . . .

Thereafter the defendant offered as its witness Mr. Carl Stevens, who testified that he was the owner of Stevens Company and lived in Thomaston. Thereafter the following occurred:

Mr. Secor: Your Honor, the State has reason to anticipate what this offer is about, and we would like to be heard on it in the absence of the jury.

The Court: The jury may be excused.

(Jury leaves courtroom.)

(In the absence of the jury:)

The Court: I will hear you, Mr. Secor.

Mr. Secor: We may be anticipating, but out of an abundance of caution, we want to make it clear that if this witness, if it is contemplated to interrogate this witness about the purchase of any television sets from Edward Miller, that it is irrelevant, completely immaterial, and has no part in this case, and it is not permissible under the very brief that the defendant submitted yesterday, attacking the character of a witness. And we want to make that clear.

* * * * *

With Respect to Questions Sought to be Reviewed, No. 2

The Court: Mr. Hennessey.

Mr. Hennessey: Mr. Wade is going to examine.

The Court: Mr. Wade, what is the purpose of this?

* * * * *

We do intend to explore the purchase of the set from Mr. Miller.

The Court: Is that set related in any way to the transaction under consideration?

Mr. Wade: It is related to testimony in the case, your Honor. Mr. Miller has testified when he was put on as a State's witness that he sold a color TV set to Mr. Stevens and he sold another color TV set to a Mr. Gaspari.

We have Mr. Gaspari standing by as another witness and we intend to explore when the set was purchased, by whom, where it is now, and that is the extent of our examination.

Mr. Secor: And we consider that highly improper, irrelevant, and immaterial in this case, and you and we know, your Honor, what the objective here is. They weren't able to attempt to attack Miller directly on the stand because of the law, and now this is a circuitous route to try to get about the same way, and there is case law that even though Miller, even though he could have been cross-examined about this very matter when he was on the stand, there is case law that independent proof through other witnesses concerning that matter cannot be offered.

Now, in the Miller case, he wasn't even able to be cross-examined about it under the law, and certainly they cannot drag in via the back door outside witnesses about the purchase and sale of sets that have nothing to do with this case.

With Respect to Questions Sought to be Reviewed, No. 2

The Court: Are you claiming that the set which was sold by Mr. Miller to Mr. Stevens is connected in any way with a television in this matter in this case?

Mr. Wade: It is our claim, your Honor, that Mr. Stevens purchased a color TV set from Mr. Miller in approximately June or July of 1967, that subsequently that set was removed from his house by the State Police and he was advised that the set had been stolen. We have testimony from Mr. Miller that he received the set that he sold to Mr. Stevens from Charles Vernale. We have testimony from Mr. Miller that he received the set he sold to Mr. Gaspari from Mr. Vernale.

Therefore, it is our claim that we can approach the question of Mr. Miller's bias or interest in this case by revealing to the jury that he, himself, was dealing in stolen color TV sets.

We feel that by presenting the simple evidence through Mr. Stevens, that he bought a set that Mr. Miller admitted purchasing from Mr. Vernale, that the jury will be entitled to draw an inference as to Mr. Miller's own connection with stolen color TV sets.

* * * * *

Mr. Wade: Yes, your Honor. I would state for the record that we have agreed at least to pursue the line of inquiry that we discussed with your Honor and counsel in chambers, in the absence of the jury, so that we can preserve our record to show the line of inquiry had we been allowed to explore it.

And I would, therefore, ask to put Mr. Stevens on to indicate on the record the questions and answers that we intended to elicit, albeit in the absence of the jury .

* * * * *

With Respect to Questions Sought to be Reviewed, No. 2

Mr. Wade: My recollection, your Honor, is that he moonlighted on repairs, that he went out on weekends and did repair jobs for which he did not account to his company because this was on his own time, and sometimes these repairs were referred to him by Mr. Vernale.

But my recollection is not about sales, as far as I can recall, Mr. Miller indicated, as far as the sales of TV's were concerned, this was Miller & Fellin business.

* * * * *

Mr. Secor: . . .

Certainly, in any case, we are on a collateral issue in an attempt to contradict this man on a collateral matter.

The Court: I am inclined to believe this is so, Mr. Wade. I think if you make your statement for the record as to what the offer of proof would be that that would suffice, rather than have the record indicate the questions and answers which would be put to Mr. Stevens.

Mr. Wade: Well, I would offer Mr. Stevens to show he knows Edward Miller of Floral Nook Drive, Waterbury; that he knows he works for Miller & Fellin Television Company; that he bought a color TV from Mr. Miller in about July of 1967, for a price of $549., a Motorola console TV, and that he made out a check to Miller's TV, which was endorsed Miller's TV, Edward Miller, and that Mr. Stevens will further testify that he no longer has this set, that the set was taken from his house, impounded from his house by the Connecticut State Police. And he was advised by the State Police that the set itself had been stolen. He no longer has the set and has not had it since the Connecticut State Police impounded it.

* * * * *

Secondly, we claim it on the theory of bias, interest and motive, with regard to the testimony of Mr. Miller. We

would intend to offer this line of evidence to show that in fact he was dealing, he was selling stolen color TV sets.

* * * * *

Mr. Wade: Subject to connecting it up, we can recall Captain Bishop, to put him on the stand to testify as to the result of his investigation, to testify where he thinks the stolen set obtained from Mr. Stevens was stolen from, and who stole it.

* * * * *

The Court. I think in order to preserve the record, probably maybe we ought to hear Mr. Stevens, that is to say, on a dry run. And then there will be no question in the event of an appeal, as to what the testimony would have been. I think we ought to hear what Mr. Stevens has to say, in the absence of the jury.

Put Mr. Stevens on.

* * * * *

Q. Will you give your name and address for the record? A. Carl R. Stevens, Thomaston, Connecticut, Major in the Signal Corps., owner of the Stevens Company in Waterbury.

Q. Do you know Edward Miller, 19 Floral Nook, Waterbury? A. I believe that is his address. I know an Edward Miller, yes.

Q. Is this the Edward Miller who works for Edward... for Miller & Fellin TV Company? A. Well, I didn't know but what he was in business for himself or with somebody else.

Q. Did you buy a color TV set from Mr. Miller? A. Edward Miller was up to the house repairing the old set and he said, 'Don't you think it is about time to get a new one?'

With Respect to Questions Sought to be Reviewed, No. 2

Q. Did you buy one from him? A. Yes. I said, 'Well, bring me one'.

Q. Can you recall— A. Eddie always did my repair work.

Q. Can you recall the approximate date that you purchased this set from Mr. Miller? A. It was paid for within a few days after that, and this is the check.

Q. Look at the check and tell us the approximate date. A. July, 1967.

The Court: July what? What was the date,

The Witness: That is the funny part, I couldn't tell you unless the bank can tell you on that.

By Mr. Wade:

Q. All right. Now, can you tell us how much you paid for it? A. I paid $549.

Q. Can you recall what kind of a set it was? A. It was a Motorola.

Q. Table model, floor model, console or what? A. It was a console.

Q. Floor model? A. Yes.

Q. Can you recall its color? A. What?

Q. What color was it? A. Probably a walnut, or something like that. I couldn't tell you right now.

Q. Now, did you pay for this television by check or by cash? A. By check.

Q. Do you have the check with which you paid for the set with you? A. The check was right here.

Q. Do you have the check with you? A. Yes, right here. That is the endorsement on the back.

With Respect to Questions Sought to be Reviewed, No. 2

Q. This is the check you paid Edward Miller with for the TV? A. Yes. He came around a couple of days after and I paid him.

Mr. Wade: May this be marked for identification?

The Court: It may be marked for identification, Defendant's Exhibit 17.

(Document referred to marked Defendant's Exhibit 17 for Identification).

By Mr. Wade:

Q. To whom was the check made out, Mr. Stevens? A. Miller TV.

Q. Did you give the check to Edward Miller? A. He got it, and he cashed it.

Q. Was it endorsed? A. It was endorsed right on the back, 'Miller TV, Edward Miller'.

Q. All right. Now, do you still have that color TV set? A. No.

Q. Was it removed from your house? A. The State Police and the Thomaston Police moved it from my house, and I had to go buy a new one.

Q. Can you recall when it was removed from your house, approximately? A. Well, it was removed from the house just about March, the early part of March, because I bought a new television.

Q. What year, sir? A. 1969.

Q. All right. And when the police removed it from your house, did they give you a receipt for it? A. No.

* * * * *

With Respect to Questions Sought to be Reviewed, No. 2

Q. Were you advised by the police why the set was removed from your house? A. They said that it was a stolen set, and they would have to take it.

Mr. Wade: All right, that is all.

The Court: All right. Is that it, gentlemen?

Mr. Secor: No questions.

The Court: All right, the objection is sustained. The court rules that this testimony is inadmissible at this time. It leads into collateral issues.

Mr. Wade: I would ask: Are you sustaining the objection to all the evidence, or may the question of the signature on the check as Miller TV and the endorsement Miller TV Edward Miller, come in to show inconsistency with Mr. Miller's testimony, as to how he was doing business?

Mr. Secor: I will object to this, if the court pleases.

The Court: I am going to sustain the objection because the testimony is nothing inconsistent with what Mr. Miller has said, so far as my recollection goes. That sometimes he did work under his own name. That was my recollection. I may be wrong, but I am going to sustain the objection.

Mr. Wade: May we have an exception?

The Court: Exception.

Mr. Wade: We will retain this check.

The Court: You may step down, Mr. Stevens.

(Witness excused).

Mr. Wade: I would like the record clear that we are excepting to the ruling, on the overall ruling on the evidence as well as to the specific question of whether or not the evidence could come in on how Mr. Miller was doing business.

With Respect to Questions Sought to be Reviewed, No. 2

The Court: The ruling of the court is, gentlemen, that the testimony of Mr. Stevens leads into collateral issues and that it is irrelevant at this time.

Mr. Wade: Now, while the jury is still excused——

The Court: I would also like to state for the record, it seems to attack the credibility, it seems to attack the credit of Mr. Miller and that credit cannot be attacked in this fashion. It seems to attack the character of Mr. Miller, and it cannot be done by specific acts. It must be done by general reputation.

Mr. Wade: While the jury is still excused, we have a Mr. Gaspari standing by. We would offer Mr. Gaspari on the same basis as Mr. Stevens, for the purpose of a set which was subsequently proven to be stolen.

The Court: Can we agree, gentlemen, that his testimony is substantially that offered by Mr. Carl Stevens?

Mr. Wade: I can agree to that. I don't know if the State could.

Mr. Secor: As far as I know, that is all he could testify to, your Honor.

The Court: In that event, I take it there is objection.

Mr. Secor: There is.

The Court: The objection will be sustained on the same ground.

Mr. Wade: Note an exception.

The Court: An exception may be noted" (Record, pp. 181-195).

c. Excerpt from the State Supreme Court Record:

"293 . . .

The Court: You are getting plenty of exercise today. All right, you are excused.

With Respect to Questions Sought to be Reviewed, No. 2

(Jury leaves courtroom).

The Court: All right. Now, what is the name of this gentleman?

Mr. Wade: Mr. Daniel Fellin.

* * * * *

Daniel Fellin, called as a witness in behalf of the defendant, being first duly sworn, testified as follows:

The Clerk: State your name, please.

The Witness: Daniel Fellin.

The Clerk: And your address?

The Witness: Mt. Tobe Road, Terryville.

The Court: What is the offer of proof here, Mr. Wade? (Record, pp. 58-9).

* * * * *

Mr. Wade: Then, once again, for the record, I would ask to be permitted to inquire of Mr. Fellin about this business relationship.

The Court: I think you can make an oral statement, an offer of proof, without going into a dry run again, because we have to move along here.

Mr. Wade: All right.

Then, my offer of proof through Mr. Fellin would be that when this corporation was formed several years ago—I am not certain of the exact number of years ago—that nearly all of the risk, meaning the capital money put into the corporation, came from Mr. Fellin; that the contribution of Mr. Miller was essentially know-how and ability to work on TV sets.

The Court: All right. No. 1, that is a collateral issue. Now, take each one separately. Go ahead.

With Respect to Questions Sought to be Reviewed, No. 2

Mr. Wade: Secondly, we would offer evidence through Mr. Fellin that having examined his books and records for the year 1967, approximately thirty-odd television sets were sold by Miller & Fellin Company.

The Court: That is a collateral issue. Next.

Mr. Wade: This examination of these books and records for the year 1967 would reveal that no television set was sold by Miller & Fellin TV either to Mr. Stevens or Mr. Gaspari.

The Court: That is a collateral issue.

Mr. Wade: Secondly, it would show the examination of Mr. Fellin would show, an examination of all of his books and records reveals no evidence by Mr. Miller of sales of TV's on his own behalf, or as Miller TV.

The Court: That is a collateral issue" (Record, pp. 200-1).

d. Excerpt from Defendant's State Supreme Court Appendix:

"ARGUMENT OF THE STATE

MAIN ARGUMENT

* * * "There is one man in this case that we can believe, if anybody, Ed Miller. This is the one man that we know is telling the truth" (T. 1904). * * *

* * * * *

REBUTTAL ARGUMENT

* * * * *

. * * * "Now Vernale and Bishop are no prizes, but what about the other witness Edward Miller. The defense has tried to

With Respect to Questions Sought to be Reviewed, No. 2

get at him but had a hard time trying. You should believe Ed Miller because he has no axe to grind in this case. He has no possible motive to tell an untruth" (T. 1970). * * * "Why would Ed Miller do a thing like this? He was merely questioned by the State Police. He was subjected to intensive cross-examination, which must have been unpleasant. And he only got involved because he was interviewed, since there is not one shred of an indication as to his being motivated to do harm or damage to the defendant. Therefore, you should believe him (T. 1971). * * *" (Appendix, pp. 32a, 33a).

e. Excerpt from State Supreme Court Record:

"ASSIGNMENT OF ERRORS

The Court erred:

* * * * *

19. In requiring a voir dire examination prior to cross-examination of State's witness Edward Miller and in rejecting the defendant's proposed cross-examination as set forth in paragraph 294, 295-296, 297 and 299 of the finding and paragraph 200 of the draft finding.

* * * * *

31. In requiring a voir dire examination of and in rejecting the testimony of Carl Stevens, Eugene Gaspari and Daniel Fellin as set forth in paragraph 292 and 293 of the finding" (Record, pp. 213, 218-220).

With Respect to Questions Sought to be Reviewed, No. 3

3. With Respect to Questions Sought to be Reviewed, No. 3:

a. Excerpt from State Supreme Court Record:

"264. Thereafter while testifying on behalf of the State, Captain Bishop stated that on February 8, 1969 he, State's Attorney McDonald and various police officers interviewed the defendant. He further stated that the interview was recorded on a tape recorder. Such statement was furnished defendant pursuant to his pre-trial motion. Thereafter the following occurred:

* * * * *

Q. And what did the defendant tell you about Charles Vernale and John Bishop?

Mr. Hennessey: I will object to that, your Honor. I think, first of all, the State has the statement in its possession as to what was said or wasn't said and, second, there is no limitation here as to time.

The question involved here in this charge, and the only charge we have pending in this court is the charge relating to a transaction on or about April 8, 1967.

The Court: Well, I suppose there is going to be an offer of connection.

Mr. Secor: Of course, it will, your Honor.

The Court: On that ground I will allow it.

Mr. Hennesey: Further, I would also object to it again as being hearsay.

The Court: Hearsay?

Mr. Hennessey: Yes, your Honor, hearsay.

The Court: With the defendant present at the conversation?

With Respect to Questions Sought to be Reviewed, No. 3

Mr. Hennessey: Yes, your Honor, that is right.

Mr. Secor: This is clearly an admission, your Honor.

The Court: The objection is overruled on that ground.

Mr. Hennessey: All right. Exception, your Honor.

The Court: Exception.

A. He told me a number of things, that he had a long association with Charles Vernale and that he knew Vernale was receiving stolen goods, and he knew that John Bishop was doing jobs in the State.

* * * * *

265 . . .

Q. What kind of jobs? A. Breaking and enterings.

Q. And did he tell you what John Bishop was doing with the fruits of his breakings and enterings? A. He, in his own words, said that 'Bishop was the guy that Charlie used, so I understand.' Those were his own words, for receiving stolen goods in Waterbury.

Q. Did he indicate over what period of time Vernale and Bishop were operating in this theft ring? A. Precisely? I don't recall whether he said a precise time or not but he indicated he had knowledge of it for some time.

Q. Did he indicate that the operations had preceded April of 1967? A. Yes, sir, he did.

Q. Did the defendant, Moynahan, ever tell you whether or not he had ever seen John Bishop, himself? A. He did tell me he saw him and he told me he met him.

Q. Where? A. He told me he saw him in Vernale's yard, backyard at his home, and he also told me at another point in the conversation that he met him at Vernale's when he, the defendant, was with a Lieutenant Healy of

the Waterbury Police Department, and was introduced to him.

Q. Was there any indication by the defendant as to the time when he met Bishop and saw him? A. He said it was a warm day.

Q. I am talking of the year. A. It would have been around 1967.

Mr. Hennessey: Well, I am going to move, your Honor, to strike all this testimony. We were given a copy of this statement that Mr. Moynahan gave, pursuant to your order for disclosure and production and now the Captain—I sit here and I have read this statement many times and it is difficult for me to find in the statement the things that the Captain is saying here.

Mr. Secor: That is proper cross, if he has something to quarrel on that. That is proper cross-examination. The Captain is entitled to say what he remembers in this interview.

Mr. Hennessey: Well, I submit, your Honor, we were given a copy of what we believe to be the exact transcript of what transpired in the interview between Paul Moynahan and Captain Bishop and Sgt. Courtney and the other people under the Captain's control. We have that in our possession.

The Court: Well, I think your objection, Mr. Hennessey, on this particular point goes to the weight rather than to the admissibility of this offered evidence.

The Court: All right. I am going to allow the evidence, Mr. Hennessey. You may have an exception (Record, pp. 108-111).

* * * * *

With Respect to Questions Sought to be Reviewed, No. 3

268 . . .

Thereafter Captain Bishop continued to testify as to the statement made at the February 8, 1969 interview with the defendant.

Q. Going bask to the interview of February 8, 1969, did the defendant indicate at any time during that interview anything concerning the activities of Charles Vernale in Waterbury? A. Yes, he indicated that Charles Vernale's home was one of the stops for people who had stolen goods that they might want to dispose of and that he was receiving stolen goods at his home.

Q. Did he indicate whether or not there was receiving of stolen goods at Vernale's home on East Farm Street resulting from breaks in Waterbury? A. He indicated that they were not from breaks in Waterbury.

Q. What did the defendant say about that? A. That he had an arrangement with Vernale, if anybody came around to try to peddle anything, to call him and he didn't want him to buy the stuff but he said to call him and tell him who peddled it, and indicated that this was stuff outside the City of Waterbury.

Q. I don't follow you. A. That is my recollection.

Q. You say this was stuff outside the City of Waterbury?

A. This was property stolen outside the City of Waterbury brought in to Vernale.

Q. Well, was there any conversation about property being stolen in Waterbury and fenced through Vernale? A. There was some discussion about it and, as a matter of fact, the defendant indicated that with Vernale they had arranged to set up Bishop for an alleged break he was to commit in Waterbury but the defendant said it was turned over to the traffic people and they muffed it, he said.

With Respect to Questions Sought to be Reviewed, No. 3

Q. Do you remember anything else about breaks in Waterbury and fencing of property at Vernale's; whether he would fence this or not? A. My recollection is that he did say stuff, stolen property, would be fenced through Vernale that was stolen in Waterbury but he didn't have any knowledge of it.

Mr. Secor: You may inquire.

Mr. Hennessey: Oh, excuse me. I would again, if your Honor pleases, move to strike this testimony as being testimony which is surprise evidence at variance with the information that was furnished to us prior to this trial and in no sense consistent with the statement that was given to us, which is the transcribed statement of the interview that was had between Captain Bishop and his subordinates and Mr. McDonald and Mr. Moynahan.

Consequently, it is my feeling that we are placed in this situation we are now in I understand to be the last day of the State's case, and the testimony he has introduced is a total surprise to us.

I would reiterate, if your Honor pleases, that it is my opinion of the hearsay rule that it excludes any extrajudical statement of any person. Included within that definition of person is a party or a defendant in a criminal case. That where such evidence is going to be introduced, it could only be admitted for those to the extent that it is an admission or a confession.

Finally, I believe what we have had here occur, to my way of thinking, is that rather than use the Captain to testify as to what was the verbatim transcription of a claimed confession or admission elicited from Mr. Moynahan, the State has completely bypassed the Grand Jury minutes and has in a sense used the Captain to impeach that statement so that the situation is reversed wherein

we are given what we understand to be the verbatim testimony of Mr. Moynahan to use for our defense and rather than being required to build a defense to anything that might be in that, we are required to use it to impeach testimony which we claim to be totally inconsistent with it.

The Court: Let me ask Mr. Secor and Mr. Gaffney a question.

Was the complete transcript of the testimony of Captain Bishop given to Mr. Hennessey?

Mr. Secor: The testimony of Captain Bishop?

The Court: I mean the testimony of the proceedings before Justice O'Sullivan.

Mr. Secor: The State will represent that the defendant in this case has had a transcript of his statement given in February (Record, pp. 115-118).

The Court: Of the defendant's statement?

Mr. Secor: Of the defendant's statement given in February that the Captain has testified concerning and of the minutes of his testimony before Chief Justice O'Sullivan for months.

The Court: Without deletion and without omission?

Mr. Secor: Without any deletion. Under the statute he was entitled to it (Record, p. 34).

* * * * *

Mr. Hennessey: My point is the best evidence of that is the statement itself. In other words, the State did—I don't question at all that the State did take a verbatim transcript on February 8, 1969, of questions propounded by Captain Bishop and answers thereto by Mr. Moynahan. And had there been questions asked of the Captain relative to the questions that he propounded and the answers he

received, that would be one thing. But in no sense was the testimony given here testimony with respect to specific questions and answers.

The Court: But Mr. Secor says you got the full transcript; is that correct?

Mr. Secor: Oh, they have had it for months, your Honor.

Mr. Hennessey: Well, my claim, your Honor, is that the transcript itself is a verbatim evidence of what was said between Captain Bishop and Mr. Moynahan.

The Court: Is there any other transcript available? I am not quite sure that I understand his position. Is there anything else available to the State which has not been made available to Mr. Hennessey?

Mr. Secor: No, your Honor. What I understand Mr. Hennessey is quarreling about is he would like your Honor to tell the State how it should present its case. Now, we see fit to present this case of the testimony, the admissions made by the defendant, through the testimony of Captain Bishop on the witness stand, who was present and heard the defendant making the statements. We are not limited to turn in a question and answer in writing like Mr. Hennessey would like to get you to tell us we have to do. We didn't want to do it that way and we don't have to do it that way. And he has got his right of cross-examination, and that is all he is talking about.

If he doesn't like what Captain Bishop says or thinks he is in error in any respect, he has got the transcript of the interview in February and he has got the transcript of the Grand Jury minutes before Justice O'Sullivan and the defense has had them for months and ought to be very familiar with them and in a perfect position to cross-examine this witness, if it wants to.

With Respect to Questions Sought to be Reviewed, No. 3

The Court: All right.

Mr. Hennessey: Well, I will submit further, your Honor, where the State obtains what they claim to be a written confession—

Mr. Secor: We don't make any such claim.

Mr. Hennessey: Where the State obtains what they claim to be a written confession or written admissions, then that document, the written confession or written admission may be introduced in evidence.

The Court: There has not been such a claim. I don't see the point, Mr. Hennessey. Mr. Secor is not making the claim that the defendant made a written confession here which they are withholding from you or any such thing. These are statements which Captain Bishop heard the defendant make at these various times. That is, as I understand it.

Mr. Secor: That is exactly it.

Mr. Hennessey: No. Let me make it clear, your Honor. As I understand it, the State has offered to introduce that he was warned of his rights and then made oral statements. Well, our claim here is that he was warned of his rights and that a verbatim transcript was taken down; that this is the only document which would constitute a confession or admissions; that if, in fact, we were—well, let me put it this way: We were never led to believe that there was a claim that there were any oral statements which were not recorded.

Mr. Secor: And you are not led to believe that now.

Mr. Hennessey: Well, your Honor understands what I am trying to say. If the State takes a written confession and they have it signed, well, I think the best evidence is the written confession. But if you have a written confession and you give it to counsel and then you put a witness on and have him testify as to some oral representations—

With Respect to Questions Sought to be Reviewed, No. 3

The Court: I can't agree with you, counsel. I can't agree with you at all on that point because the best evidence here would be what he heard; that is, what Captain Bishop heard the defendant say. That is the best evidence.

Mr. Hennessey: Well, you understand, your Honor, this is not some kind of a summary or synopsis, the document which was given to us. There was a tape recorder and every word that was said between these two gentlemen or any other member was taken down.

* * * * *

Mr. Hennessey: Well, you must understand what my point is; what I am trying to say is, that it came as a surprise to us, your Honor, in that we assumed Captain Bishop might come here as a witness and he might testify as to: 'Did you ask, would you like to have an attorney present?'

And he answered, 'No.'

All right, now, that is verbatim transcript of what was said but then all of a sudden we realize that there is no attempt being made here to follow that line of questioning. So we are talking, I submit, about two different confessions. And if we are talking about another confession, I submit we have never received a copy of it and it is for that reason I would ask that the court reporter, at his earliest convenience, prepare a copy of that transcript, so your Honor could review the two and find possibly some error or possibly all the things that were said are in this statement.

Mr. Secor: Let me assure your Honor they are in there.

The Court: The objection is overruled. Exception may be noted" (Record, pp. 118-121).

With Respect to Questions Sought to be Reviewed, No. 3

b. Excerpt from Defendant's State Supreme Court Appendix:

"TESTIMONY OF WAYNE BISHOP

* * * * *

CROSS-EXAMINATION

Exhibit 7 for Identification is a transcript of the February 8, 1969 interview (T. 682). It is a verbatim word for word transcript of the entire interview (T. 683).

* * * * *

On February 8, 1969, Moynahan was informed that the investigation being conducted was of Vernale and his cohorts, i.e., John Bishop, Robert Pinter and an Edward someone (T. 686, 687). Moynahan indicated that he did not want an attorney (T. 687). Moynahan told him that Vernale had been his informant from 1959 through March of 1968 (T. 688). * * * Moynahan stated that he warned Vernale not to buy stolen goods but to tell him if anyone tried to sell goods to him (T. 691).

* * * * *

He stated that he first got suspicious of Vernale and first heard about Vernale possibly receiving after an arrest in the area of Vernale's home on March 8, 1968 (T. 701). Moynahan stated that he never received anything from Vernale (T. 700). He said John Bishop never delivered a set to his home (T. 702, 703). He said he hardly knew Bishop (T. 703). He said he did not know that Vernale was receiving during the period in question (T. 705). He said he never turned his back on anything Vernale did (T. 708). He warned Vernale to keep his hands clean (T. 708). He said that if he knew Vernale were receiving stolen goods he would have arrested him (T. 709). He said he never saw any stolen property stored at Vernale's" (T. 715) (Appendix, pp. 18a, 19a).

With Respect to Questions Sought to be Reviewed, No. 3

c. Excerpt from State Supreme Court Record:

"ASSIGNMENT OF ERRORS

The Court erred:

* * * * *

21. In admitting the testimony of Wayne Bishop as set forth in paragraphs 263, 264, 265, 266, 267, 268, 271 and 272 of the finding" (Record, pp. 213, 219).

4. With Respect to Questions Sought to be Reviewed, No. 4:

a. Excerpt from State Supreme Court Record:

"248. Now, in this particular case, members of jury, you will recall, I am sure, that Mr. Paul Moynahan took the stand. Mr. Paul Moynahan testified.

"Now, under our law, an accused person is not obliged to take the witness stand in his own behalf nor is he obliged under our law to produce any witnesses in his own defense.

"On the other hand, he has a perfect right to do so, as this defendant has chosen to do. In weighing the testimony he has given you should apply the same principles by which the testimony of other witnesses is tested, and that necessarily involves a consideration of interest in the case.

"You will consider the importance to Mr. Moynahan of the outcome of the trial, and his motive on that account for not telling the truth. An accused person, having become a witness, stands before you just like any other witness, and is entitled to the same consideration and must have his testimony measured in the same way as any other witness, including, however, his interest in the verdict you are to render."

To this portion of the charge, the following exception was taken:

"Mr. Hennessey: Thank you, your Honor. My first exception would be to your Honor's charge in which you gave a charge to the jury with respect to the bias or interest of Paul Moynahan, the defendant, in testifying. I believe that this charge is one which has been recently recognized in the case of *State of Iowa* vs. *Bester*, 167 N.W.2d 705, a 1969 Iowa case, as being ground for reversible error in that, first, singling out the testimony of a defendant in a criminal charge to a certain extent is violative of his presumption of innocence.

With Respect to Questions Sought to be Reviewed, No. 4

The Court: Is that a United States Supreme Court decision?

Mr. Hennessey: No. It is an Iowa case.

The Court: I did not think the United States Supreme Court had gone that far as yet. It may, but I don't think it has done so up to this point. All right.

Mr. Hennessey: Well, in any event, I feel quite apart from the fact that I cite the *Hester* case which held for the proposition that such a charge is unfair in that it creates undue focus upon the testimony of the defendant and thereby casts again undue focus on his testimony, and singling it out in a criminal case, particularly where his testimony is significant is improper and ground for reversible error.

The Court: Well, until such time as this State's Supreme Court tells me it is wrong, I will do it.

Mr. Hennessey: I have just stated by exception.

Secondly, I think that charge likewise violates the presumption of innocence by its very nature. It says although a man is innocent and fault free, the suggestion is if he testifies you take into account the fact that he has done something he is trying to get out of.

The Court: Well, doesn't he expose himself to the trial? In other words, he exposes himself to its risks and he has to have his testimony measured in the same way. How is a juror to know what rule to apply, what guideline to apply to his testimony as opposed to that of any other witness? There has to be some standard; there has to be some guideline to a jury.

Mr. Hennessey: You may be right, your Honor. I am just taking my exception.

The Court: An exception may be noted" (Record, pp. 81-3).

With Respect to Questions Sought to be Reviewed, No. 4

b. Excerpt from State Supreme Court Record:

"ASSIGNMENT OF ERRORS

The Court erred:

* * * * *

7. In charging the jury as appears in paragraph 248 of the finding. Said charge was erroneous because it unfairly singled out the testimony of the defendant for adverse comment, because it was inconsistent with the presumption of innocence, and because it suggested that the defendant's testimony was entitled to less weight than that of any other witness merely because he was the defendant" (Record, pp. 213-4).

5. With Respect to Questions Sought to be Reviewed, No. 5:

a. Excerpt from State Supreme Court Record:

"MOTION FOR PRODUCTION AND INSPECTION

The defendant moves this Court, pursuant to C.G.S. Section 54-86A for the production, inspection and copying of the following items which are or may be material to the preparation of his defense:

* * * * *

3. All exculpatory information or material now in the State's possession or which may come into the State's possession which shall include but not be limited to:

A. Written or oral statements or notes which were otherwise recorded statements of one Charles Vernale made since the start of the investigation involving this case including but not limited to:

1) Statements made to the State Police or State's Attorney's office prior to his appearance before Judge O'Sullivan.

2) Recorded testimony before Judge O'Sullivan.

3) Statements made to the police in Somers.

4) Statements made to the State Police at the State Barracks in Hartford since June 1969.

* * * * *

C. Written or oral statements or notes which were otherwise recorded statements of one John Bishop made since the start of the investigation involving this case including but not limited to:

1) Statements made to the State Police or State's Attorney's office prior to his appearance before Judge O'Sullivan.

2) Recorded testimony before Judge O'Sullivan.

* * * * *

With Respect to Questions Sought to be Reviewed, No. 5

7. Produce for inspection and copying all evidence including but not limited to that produced before the O'Sullivan Grand Jury (so-called) which is favorable to the accused and would tend to exculpate him of the crimes charged.

* * * * *

Defendant
By F. Owen Eagan
His Attorney

(Filed: Sept. 11, 1969.)

* * * * *

9/23/69 * * * * *

* * * * *

par. 3 granted as to exculpatory information.

* * * * *

Par. 7 granted as to exculpatory information.

(Barber, J.)"

(Record, pp. 10-13).

b. Excerpt from Defendant's Supreme Court Appendix:

"October 13, 1969

Francis M. McDonald, State's Attorney
7 Kendrick Avenue
Waterbury, Connecticut

Dear Frank:

* * * * *

I was sorry that the Judge saw fit to place the very heavy burden of examining all the material in the file to produce exculpatory evidence for us. In my original Motion for Disclosure I tried to spell out the evidence I thought was exculpatory, but I am sure there are other statements in the file which tend to vindicate our clients. It has always been my belief that negative statements are often in of

themselves exculpatory and I would ask that you examine your file with this in mind.

*** * * * ***

Sincerely,
Owen Eagan"

"STATE OF CONNECTICUT
NEW HAVEN COUNTY
OFFICE OF STATE'S ATTORNEY AT WATERBURY

October 29, 1969

Owen Eagan, Esquire
Attorney at Law
40 Russ Street
Hartford, Connecticut 06106

Dear Owen:

Thank you for your letter of October 13, 1969.

With respect to your observations concerning exculpatory material, we believe that the only relevant exculpatory material is the fact already known to you, that Charles Vernale at one point denied that he had given Paul Moynahan a color television set. I do not believe that negative statements are any more exculpatory than incriminating statements.

*** * * * ***

Francis M. McDonald
State's Attorney at Waterbury"

(Appendix, pp. 34a, 35a).

c. Excerpt from State Supreme Court Record:

"MOTION TO DISMISS

The defendant in the above entitled action hereby represents:

With Respect to Questions Sought to be Reviewed, No. 5

1. On or about September 25, 1969, the Honorable Court entertained argument on a Motion for Discovery.

2. On or about September 25, 1969, at the conclusion of the aforementioned argument, the Honorable William P. Barber ordered the State's Attorney to provide the defendant's counsel with all exculpatory information or material in the State's possession.

3. That the State's Attorney has not provided any exculpatory information to the defendant's counsel although said information is available to the State's Attorney in the form of transcripts and other recorded testimony.

WHEREFORE, the defendant hereby respectfully requests that the court dismiss all proceedings against him in the above entitled case.

Defendant
By F. OWEN EAGAN
His Attorney

(Filed: Nov. 1, 1969.)

ORDER

Nov. 25, 1969

Motion Denied.

By the Court (BARBER, J.)
FRANCIS J. BUTLER
Clerk"

(Record, pp. 13-4).

d. Excerpt from State Supreme Court Record:

"275. Immediately upon receipt and examination of the prior statements and testimony of Charles Vernale pursuant to the order of the court as set forth in Finding No. 274, the defendant made the following motions to dismiss and for a mistrial:

The Court: Now, Mr. Hennessey, do I understand you have a motion to address to the court?

With Respect to Questions Sought to be Reviewed, No. 5

Mr. Hennessey: Yes, your Honor.

It is my understanding, first of all, that the entire transcript of Mr. Vernale was going to be marked as an exhibit for identification and sealed, which, I believe, has not been done to date.

It was also my understanding or possibly it was a motion to be made that the entire testimony of Mr. Miller was going to be marked for identification and sealed, which, I believe, has not been done to date.

And I am not certain, either, whether all the statements of Mr. Bishop have actually been marked for identification. And all these are germane to our motion, which is a motion at this time to dismiss, your Honor.

The basis for that motion is, as I believe I informed the court on previous occasions, that on September 23rd — and I now have obtained a transcript of the proceedings of September 23rd, relative to the order of Judge Barber, with respect to the motion for production and inspection of August 29th, and I believe if your Honor reads the order of Judge Barber, you will find that Judge Barber ordered the State to produce all exculpatory information or material now in the State's possession, which shall include, but not be limited to, the then listed categories, a, b, c, d, e, f, g.

And all those were granted. H and I were denied.

Then, further, with respect to 7, I believe he also granted that motion insofar as it related to the exculpatory testimony which was obtained through the Grand Jury proceedings.

* * * * *

And further, that these were mere specifications of types of exculpatory evidence sought, and that the order was not in any sense limited merely to those, but rather, that Judge Barber, as I read the transcript of his order of September

With Respect to Questions Sought to be Reviewed, No. 5

23rd, and as I checked the docket after inquiry in the clerk's office with respect to the granting of that motion, it appears clear to me that Judge Barber did in fact order the production of all exculpatory testimony in the possession of the State's Attorney.

On October 13, 1969, Attorney F. Owen Eagan of Hartford, * * * wrote to Mr. Frank McDonald, asking him to give all exculpatory evidence for the purpose of complying with the order, pursuant to § 54-86a, which order was granted on September 23rd, and I have a memorandum of law, and I have attached as an exhibit a copy of that letter.

On October 29th, Attorney Frank McDonald responded:

'With respect to your observations concerning exculpatory material, we believe that the only relevant exculpatory material is the fact already known to you, that Charles Vernale at one point denied that he had given Paul Moynahan a color television set. I do not believe that negative statements are any more exculpatory than incriminating statements.'

I have attached a copy of that letter as Exhibit B.

On the same day that letter was written, Attorney Eagan, on behalf of Paul Moynahan, made a motion to dismiss. The motion to dismiss is on file dated October 29th.

At the conclusion, the Honorable Court entertained arguments on the motion for disclosure, and at the conclusion of the aforementioned arguments, the Honorable William P. Barber ordered the State's Attorney to provide the defendant's counsel with all exculpatory information or material in the State's possession.

The State's Attorney has not provided any exculpatory information to the defendant's counsel, although said information is available to the State in the form of transcripts and other recorded testimony.

With Respect to Questions Sought to be Reviewed, No. 5

On November 25th, I argued before Judge Barber this motion to dismiss which was denied (Record, pp. 137-140).

In the course of that, I stated in Court — and I have a transcript, so that there will be no feeling that I am taking things out of context. I asked Mr. Haffner to also obtain for me a transcript of that proceeding, and they have it, and as I understand it, it is in its entirety, as evidenced in the stenographer's notes (Record, p. 40).

And this was the court: 'You can't search the State's Attorney's file. If there is anything in particular that you point to, I will examine it, but if you're asking for a blanket search of the State's Attorney's file, you are going to be denied.

'I assume the State's Attorney has turned over to you everything that is reasonably exculpatory.'

I then asked to be heard:

'If I might be heard on that?'

And then the court said:

'In the absence of any showing that he hasn't, that would suffice. You can prove later on that he hasn't. Of course, that is available to you.'

And I said: 'Might I at least be permitted to make my point with respect to this information?'

And I said, 'It is my understanding, and again I stand corrected if I am wrong, that we have received no exculpatory information of any kind. It is our claim that there are statements in the possession of the State's Attorney, which include statements tending to indicate that our client was not involved in this crime, statements of persons who are charged as co-conspirators, who deny any knowledge of our defendant. Statements of persons who are claimed to have knowledge of receipt of stolen goods wherein they deny that

With Respect to Questions Sought to be Reviewed, No. 5

they have such knowledge. Prior contradictory statements. And if I might be permitted, I would cite your Honor the case of *Napue* vs. *Illinois*, 360 U.S. 264, which held that exculpatory evidence which was evidence which would affect the witness' credibility, could not be denied to a defendant.'

I then said, '*Brady* vs. *Maryland*, and *Giles* vs. *Maryland* discuss in some length the requirement that the State has a duty to disclose exculpatory evidence, whether or not asked for.'

The answer replied to that by the Court: 'Those are basic.'

And then I said, 'And the position which we are trying to make, obviously we aren't asking to go through their files. We know your Honor never ruled on that. The only alternative is, if your Honor would go through the file, because frankly, how else are we to know? We have reasonable cause to believe that such statements exist.'

And then the court said, 'I don't think we have come to the point yet where a court has to go through the entire file of the State's Attorney in every case.

'First of all, there is an order from the court that he turn over any exculpatory matter. If you can point to any specific thing, then I will examine it and see if it reasonably is exculpatory.'

Then I said, 'Well, we would make the claim that any statements in the State's Attorney's file, if he has them, that indicate a lack of knowledge of the involvement of Mr. Moynahan, would be constituted exculpatory evidence. Any named co-conspirator's statement would be constituted exculpatory evidence. Or any statements in the file which are inconsistent with other statements in the file, where a witness or a party has given a statement on one occasion, and has given a contradictory statement denying the prior statement on another occasion, we would consider those to be exculpatory.'

With Respect to Questions Sought to be Reviewed, No. 5

At which point Mr. McDonald said, 'We wrote to Mr. Eagan on October 29th, advising that Charles Vernale at one point denied he had ever given Paul Moynahan a color television set, stating that was, in our belief, the only relevant exculpatory material we are aware of in our file.'

I then said, 'But it also states: "I do not believe that negative statements are any more exculpatory than incriminating statements."' So this is where Mr. Egan and Mr. McDonald joined issue on the law.

Mr. Vernale, I believe, testified before the Grand Jury. We were not given a copy of that, yet there is an indication that Mr. Vernale has given contradictory statements.

The Court: The motion to dismiss is denied.

Mr. Hennessey. Exception.

Since the time that this trial commenced, your Honor, I would submit that we have been given what I would call legally exculpatory evidence which, in each instance, was only given pursuant to the exercise of your Honor's power over the objection of the State.

In the testimony of Mr. Bishop alone, let's consider what was exculpatory in that.

The State put Mr. Bishop on as their witness. The State put Mr. Bishop on to testify as to a transaction in April involving a certain identified Motorola set. Yet, the State had in its possession, and failed to turn over, testimony which was inconsistent, I would submit, as to date, as to time, as to place, as to manner, and as to description, as to what that set was that was put in there, when it was put in there, where it came from.

None of these matters were ever turned over to us, your Honor, except through your Honor's office, and after we had to make a motion when Mr. Bishop had already testified.

With Respect to Questions Sought to be Reviewed, No. 5

Mr. Miller took the stand, Mr. Miller testified finally on cross-examination about obtaining two sets from Mr. Vernale. The State had in its possession testimony inconsistent with that, testimony indicating that more than two sets were involved in Mr. Miller's transactions.

Further, the State had in its possession two statements wherein I would submit, and they have now been marked into evidence, Mr. Miller indicated a lack of recall, a lack of ability to describe the set. He indicated inconsistencies as to how he arrived at the home. He indicated inconsistencies as to when he met Paul Moynahan. On one occasion he said he had met him before. On another occasion he said he never met him until after.

All these inconsistencies are there, and all these inconsistencies and contradictory statements which go to the direct issue of credibility of that witness, were only made available to us through your Honor's office.

Further, there are still other statements that Mr. Miller has made which we have not been given an opportunity to see. Of course, that we had excepted to on other grounds, but we do submit the entire transaction between Mr. Miller and Mr. Vernale would be germane to any cross-examination of Mr. Miller for a number of reasons, not the least of which would be his ability to identify and recall this particular set as he has testified to in court.

And then, finally, your Honor, again over much objection from the State, we were then given an opportunity finally to see portions of Mr. Vernale's statements and this is what brought this to a head in my mind, having finally, on Saturday morning, being given the statements, examining them, and finding it replete with inconsistencies, replete with inconsistencies not only with respect to Mr. Vernale's own statements on various occasions, but clearly inconsistent with Mr. Miller's testimony, and clearly inconsistent with Mr. Bishop's testimony.

With Respect to Questions Sought to be Reviewed, No. 5

And I would submit to your Honor, for example, in the statement on one occasion Mr. Vernale did say he gave Paul Moynahan a color television set or he didn't but he also said he did, and he also said it was a 25-inch set, and he also said it was delivered late in the summer, and he also said John Bishop never was with him.

That was all in that first statement when he did implicate Paul Moynahan.

Then he testified, under oath, in front of the Grand Jury, and he said he lied, and he testified to why he said he lied, because he said that the State Police had come up to him and caused him to lie, and he gave Judge O'Sullivan his reasons why he said he was inconsistent.

Further, he testified on all the occasions wherein he was asked whether he did or he didn't, in each instance when he testified, he testified as far as he knew, Paul Moynahan had no knowledge of what he was doing.

The Court: You are talking about Vernale now?

Mr. Hennessey: I am talking about Vernale now, and that Paul Moynahan had no knowledge that Vernale was involving hmself in the stolen stuff.

Further, he said he only had very limited dealings with John Bishop on only three or four occasions.

Further, he indicated on one occasion he never even first came into contact with Bishop until late in the summer of 1967, and possibly 1968:

The Court: Don't you have a right to cross-examine Mr. Vernale on these issues, if you so desire?

It seems to me, assuming that there was a delay in getting this information to you, and assuming what you say is correct, I don't see how a motion to dismiss—to grant a motion to dismiss at this time would be justified, in view of the fact that the information is available to you. You have

been given this information. You have a right to cross-examine Mr. Vernale to your heart's content, within limitations set by the Court (Record, pp. 140-5).

Mr. Hennessey: Let me suggest this to you, your Honor: If I might draw an analogy with a civil case, since certainly under civil law in this State we do have rights of discovery that are recognized.

Let's assume a man got on the stand and started testifying as to an injury which was not previously disclosed pursuant to an order for disclosure. Would there be any question in the mind of any Court: That would be totally improper. The reason for the discovery is to give counsel an opportunity to prepare their case, and to prepare their defense (Record, p. 41).

Mr. Hennessey: Now, here we come on a Saturday when Mr. Bishop has long been off the stand, for example, yet now we find the State had a lot of information totally inconsistent with what Mr. Bishop said. How does one reasonably prepare a case for defense consistent with Rule 54-86A, which gives the right of discovery for the purpose of preparing a case, for defense, when the State just merely refuses to comply with it, or merely says that they have complied, even though to me it is crystal clear on examination of these documents that they did not, that they never complied with this rule or this ruling of the court.

Now, this isn't, we are not just talking about the obligation to produce evidence at trial, we are also talking about a statute of the State of Connecticut which was passed for the purpose of giving an attorney defending a person charged with a crime an opportunity to see and examine information which would be of assistance to him in the preparation of a defense.

Now, that was the order that Judge Barber granted, and he granted it many, many, many months ago. Yet, here we are, I submit, flying blind. We take the witnesses one at

a time, in the order that the State puts them on, and then when we—when they have been testifying, when the State, having exhausted all its objections to even still giving us this information, they then come forward and furnish it to us (Record, pp. 145-6).

We then have an opportunity to cross-examine one witness with respect to what he said. But, I would submit to you, your Honor, for example, let's take John Bishop, and let's say we were diligent counsel, and I submit we have been in this case, and certainly if I had not been, I would submit on behalf of Attorney Owen Eagan, in the preparation of their case, that he was a diligent attorney. He was a former United States Attorney. He is a man of high repute. He knows how to prepare a case, and he worked hard on this one (Record, pp. 41-2).

Now, let's say we had John Bishop's testimony, and I would submit to you I would ask your Honor to put your Honor in the place of a defense attorney in this case, what might you have done?

It might have been interesting to try to track down dates and times to check out the Sheffler store, to try to develop a line where we could show certain inconsistencies.

Further, had we had Mr. Vernale's testimony, we could have looked at it in the context of Mr. Bishop's. Where Mr. Vernale says one thing, I know John Bishop never delivered that set with him, another thing I know, that set never sat in my garage for three or four weeks, because it was turned over within two days, and this is even when, on April 3rd, he is testifying that he did give a set to Mr. Moynahan.

Further, still, I would ask your Honor to read the statement of April 3rd, and consider it in the context of the facts that this testimony was given as a result of the conversation with Mr. Secor. I have no knowledge of what Mr. Secor and Mr. Vernale did on April 2nd. I do know, however,

that on April 3rd Mr. Vernale came before Judge O'Sullivan and in effect admitted he perjured himself on April 1st. And it is perfectly obvious to me what was done there to cause him to come—to become so violently changed in his testimony, and I think it shows in the transcript, if your Honor will examine it.

With respect to Mr. Miller, the only information we have about Mr. Miller was the information we went out and hired people ourselves to go out and try to see Mr. Miller, and try and check him out at our own expense. We had to go out and try and find out what Mr. Miller was going to say.

Yet, even so, we were never made aware that Mr. Miller's recall was so poor or so questionable, that he said, when asked by the police, that he couldn't remember the make or the model or the year, 'I think it was a Motorola, but I can't remember what kind.'

We never had this information available to us. We never were made aware, for example, that Mr. Miller denied selling some sets and admitted selling others to the State. I don't even know how many he admitted, because in the questions from the State to Mr. Vernale, there is a question, there is, I believe, a question from someone, either Wayne Bishop, or Mr. Secor, saying that he admitted on, I think, three or four occasions.

I don't know what words were used, so I assume there even may be more.

I would submit, your Honor, that certainly the State has not at this point exhausted its disclosure of exculpatory information. I submit that they never even made an honest effort to start; that to call Frank McDonald's letter of October 29th compliance with that order under Section 54-86A, I submit it is really, it is so inconceivable, . . . (Record, pp. 146-7).

With Respect to Questions Sought to be Reviewed, No. 5

. . . and I would like to point out, your Honor, I have a memorandum of law on this, and I would like to point out some law with respect to this.

And I feel very strongly about this.

My first paragraph reads:

'The duty of a prosecutor is to present all evidence at a criminal trial whether it be favorable or unfavorable to the State's case,' citing *State* vs. *Guilfoyle.*

'The State's Attorney is not a party to the case, but rather a servant of the law with the twofold aim that guilt shall not escape or innocence suffer.' That is *Singer* vs. *United States,* 380 U.S. 24.

'The prosecution has an affirmative duty to produce all exculpatory evidence in its possession where such evidence is material, either to guilt or to punishment, irrespective of the good or bad faith of the prosecution.'

That is *Brady* vs. *Maryland.*

'A prosecution'—and this is a quote—'A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him, helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice, even though, as in the present case, his action is not the result of guile.'

'When there is any doubt as to what evidence must be disclosed, which might be admissible and be useful to the defense, the prosecution is not to decide for the Court what is admissible or for the defense what is useful.'

Barber vs. *Warden,* 331 F.2d It is a 1964 case.

'The duty of the prosecution, which includes investigating officers, as well as attorneys, is an affirmative duty to make prompt disclosure of any information known to it

With Respect to Questions Sought to be Reviewed, No. 1

which might have material bearing on the truthfulness of any evidence adverse to the accused.'

That is *Estes* vs. *United States*, and I have the citation.

'The State is accountable for all evidence which comes within the knowledge of its agents, so that knowledge of the police is chargeable to the prosecutor.'

That is *Evans* vs. *Koop*. That is also a Federal case.

'Where the non-disclosure is deliberate either in the sense of a deliberate decision to suppress for purpose of obstructing, or a failure to disclose evidence whose high value to defense could not escape prosecutor's attention, such disclosure is compelled, and the failure to make will be deemed to be clearly prejudicial.'

That is *United States* vs. *Keogh*. That is a Second Circuit case.

'The time for such disclosure must be when the disclosure would be of value.'

'The failure to disclose evidence which might cause the jury to have a reasonable doubt as to the guilt of an accused, is constitutionally unpermissible.'

That is *Levin* vs. *Clark*.

'Exculpatory evidence takes many forms. It includes evidence contradictory to other evidence.'

That is *Miller* vs. *Pate*, 386 U. S. 1.

'Clearly evidence affecting the credibility of State's witnesses is included in this category.'

That is *Giles* vs. *Maryland*, a United States Supreme Court case, and *Napue* vs. *Illinois*, a United States Supreme Court case, the same cases that I cited back on November 25th, your Honor.

With Respect to Questions Sought to be Reviewed, No. 5

'Section 54-56 permits a court at any time on motion of defendant to dismiss an information where, in its opinion, there is not enough evidence to justify the bringing or continuing of it, or of placing the accused on trial.'

Section 54-86A permits a pre-trial motion to produce exculpatory information or material for copying to be used in the preparation of the defense.

'In this case such a motion was granted on September 23rd. October 13th, a further request was made. On October 29th, the State's reply, and then the motion on November 25th.

'At trial over the State's objection, the Court ordered disclosure of several statements of witnesses, which statements it is submitted are replete with contradictory material as to various testimony as well as exculpatory material. For example, the State knew that its case rested on a claim that a 22-inch Motorola console, early American maple set, was stolen from Martin's Appliance in North Haven on April 8, 1967. Nonetheless, they failed to disclose paragraph one, that John Bishop, a proposed witness, testified on more than one occasion that the set was of another make, and was stolen from another store in another town at a different time.

'Paragraph two, that Edward Miller, a proposed witness, testified on two occasions as to his inability to recall the set by description.

'Paragraph three, that John Bishop had admitted numerous other robberies.

'Paragraph four, that Charles Vernale's statement denying giving Moynahan a set detailed reasons why he gave a prior inconsistent statement.

'Paragraph five, that Mr. Vernale stated that the set was delivered within two days of the robbery, which is inconsistent with Mr. Bishop's testimony.

With Respect to Questions Sought to be Reviewed, No. 5

'Seven, that Mr. Vernale always stated that Moynahan had no knowledge of his activities.

'Eight, that Mr. Vernale always stated that the TV was a gift, given out of friendship.

'Nine, that when Mr. Vernale first admitted giving Moynahan a set, he misdescribed it.

'Ten, that Mr. Vernale denied ever selling Mr. Miller any sets.

'Eleven, that the State had statements from Mr. Miller in which he admitted selling more than two sets received from Mr. Vernale.

'Twelve, that Mr. Miller's Mr. Bishop's and Mr. Vernale's statements all contained inconsistencies as to dates, places, events, and recollection which would have direct bearing on their own testimony, and on that of each other.

'Based on these examples alone, it seems that the State has failed to comply with the order of this Court. Further, it appears that an *in camera* inspection of its file should be conducted by the Court to determine whether other exculpatory information or material has been withheld.'

I submit, your Honor, that there comes a point when we must consider the rights of the accused as to how much longer the State is going to be permitted to prosecute.

In this instance there is no question that the State has been engaged in exhaustive investigation, and that during all this period of time, Mr. Moynahan was under charges.

And there can be no question that from the time we entered this case, we asked and insisted that the case go forward promptly and expeditiously; that there were at least four or five delays over the commencement of the trial, at the request of the State; that it was not until after Christ-

With Respect to Questions Sought to be Reviewed, No. 5

mas that the State, all of a sudden filed a substituted information, and they dropped the conspiracy charge, and nolled it.

And, nonetheless, informed Mr. Moynahan to go on trial for receiving stolen goods, or receiving a stolen television set.

This man now is in a situation where he has been out of work since, I believe at least May of 1969, without pay, and that he will continue to be out of work without pay until the ultimate resolution of this matter.

Possibly he will be out without pay forever.

We have made every effort, we submit, to defend him in the best manner possible, and we feel now, as this trial develops, that it becomes crystal clear to us that we were denied various testimony of an exculpatory nature, which the Court had ordered way, way back before this case ever started; that it has seriously affected our ability to put on a proper and adequate defense; but there is no way that you can rectify this dereliction on the part of the State.

Their failure to turn over matters which the Court ordered merely by saying, 'Well, you have got them, Mr. Hennessey, finally.'

We get the statements of Mr. Vernale on Saturday, although his name has been mentioned throughout the trial and that the jury, I am sure, has all sorts of pictures of Mr. Vernale in their mind. And on Saturday morning we are given these statements and there is not one line, from the letter of Mr. McDonald, and there are really hundreds of pages of testimony.

Now, I cannot conceive of how the State can say they did comply with that order, or how they cannot concede that we have been seriously prejudiced in their refusal to comply with that order.

With Respect to Questions Sought to be Reviewed, No. 5

We were never given the opportunity to prepare this case as we should have been permitted to, because of the Court's ruling, and it is for that reason we are now in a situation where we have been on trial for many, many weeks. I submit we are going into our third week of trial here, and it is not a simple trial, but a very complicated trial, there is no question. I would hope your Honor would agree with me that it is quite a complicated trial, and there have been difficult rulings that have arisen, and if your Honor would again place yourself in my position, I am sure you would realize how difficult it has been to try to adequately prepare a case from the outset, wherein we could develop a line of defense which was consistent and logical with the information that we had a right to have, when in point of fact, we were never given that information.

I cannot conceive that if this were a civil case, and these gentlemen are representing a plaintiff and it was merely just an order to produce medical testimony, and all of a sudden they came in with a doctor whose report they were never given, who gave this man a 15% disability of the back, although on any prior occasion there had been no disability rendered, that the Court would not be incensed immediately, because these type of situations I am sure your Honor in his experience is aware of the reason for disclosure, and the purpose of disclosure, for the preparation of a defense, that where such things come in at the eleventh hour, they cannot be permitted.

I just feel, your Honor, that you should examine, certainly, Mr. Vernale's testimony that we were given, and all the testimony in his file, and I cannot feel that you can escape the conclusion that had you been the lawyer, and were you standing where I am now, that you would not feel that there have been no compliance, and had there been compliance promptly, and in accordance with the order, we would have been given an opportunity to prepare our defense.

With Respect to Questions Sought to be Reviewed, No. 5

The Court: All right (Record, pp. 42-8).

* * * * *

The Court: Gentlemen, it serves no purpose at this time to prolong this matter any further. The court is of the opinion that, and I presume the State's Attorney's office has done its duty.

I cannot assume the impossible burden of going through all these items and all these exhibits, all the transcripts of all the testimony that has been taken. They will be marked for identification. If there should be a need for an appeal to a higher court, and the higher court feels that there has been a miscarriage of justice in this case, I am sure that the Supreme Court of our State will rectify any such error on the part of this court.

* * * * *

On the presumption that the State's Attorney has done its duty in turning over any material which is of an exculpatory nature, I am going to deny your motion, Mr. Hennessey, and an exception may be noted.

The exhibits will be marked for identification and they will be available for review in the Supreme Court, if necessary.

The Court: Motion for a mistrial is denied.

Mr. Hennessey: Exception.

The Court: Exception may be noted" (Record, pp. 148-9).

e. Excerpt from Defendant's State Supreme Court Appendix:

"TESTIMONY OF JOHN BISHOP

* * * * *

CROSS-EXAMINATION

* * * * *

" * * * He said in his signed statement that when he

returned to Vernale's for his money he helped Vernale load an RCA uncrated floor model color console into his station wagon (T. 171). He further stated that he didn't recall whether he brought the set to the front or the rear of the Moynahan house (T. 176, 177). He stated that possibly the RCA set was one of two RCA sets taken from H. P. Sheffler, Inc. of Deep River in the middle of the summer of 1967 (T. 180). * * *

* * * * *

In March of 1969 he testified under oath before the Grand Jury (T. 137). He testified that he stole some TV sets from Sheffler's in Deep River (T. 188). He testified that they were worth about $1000 to him when he took them to Vernale's (T. 188). He stated that he came back the next day and that Vernale asked him to deliver a TV set (T. 190). He testified that he thought it was a Zenith or an RCA (T. 190). * * *

* * * * *

He testified before the Grand Jury that the first time he met Paul Moynahan was at Vernale's house in June of 1967 (T. 207). * * * " (Appendix, p. 8a).

f. Excerpt from Defendant's State Supreme Court Appendix:

"TESTIMONY OF EDWARD MILLER

* * * * *

CROSS-EXAMINATION

* * * * *

"In his statement to the police on February 17, 1969 he told them he made a repair at the Moynahan home about a year ago (T. 512). * * *

This transcript was recorded on tape and a typed copy was shown to him (T. 513). No corrections were made to

it by him (T. 513). He further stated that it was a 23" set but that he couldn't tell the model or anything (T. 513). When questioned further in that statement he said it was a console model but that he couldn't tell the name or the serial number of the model itself because he didn't look at it (T. 514). * * *

On February 18 he was asked by the police if he had a chance to think over his statement of the prior day and to remember what make the set was * * *. He then stated that he couldn't remember what make it was as it was almost 2 years ago (T. 519). * * *

He then said that whatever work he did, he couldn't recognize the set (T. 520). * * *

The interviews on both the 17th and 18th were conducted by 3 policemen and each took an hour and a quarter (T. 520). The entire interviews were on tape (T. 520). * * *

He was also asked on February 18 if he remembered what make set it was and he said no because he was concerned about the trouble and not the make of the set (T. 527). He further told the police February 21 that he sold a set obtained from Vernale to a Mrs. MacIntosh in Wolcott (T. 530, 531, 536). He admits that that statement was false (T. 530, 531, 536).

On February 21 he told the police that he had no thoughts about the Moynahan set except what he told them on the prior occasions (T. 537). He testified before the Grand Jury that he met Paul Moynahan once at Vernale's 3 or 4 weeks before he did the repair work (T. 572). In his statement of February 17 he stated that he had never met Paul Moynahan before he did the repair work (T. 573). He stated on February 17 that he met Moynahan once at Vernale's after he did the repair work (T. 574). * * * " (Appendix, pp. 14a-16a).

With Respect to Questions Sought to be Reviewed, No. 5

g. Excerpt from State Supreme Court Record:

"ASSIGNMENT OF ERRORS

The Court erred:

* * * * *

4. In denying the defendant's Motion to Dismiss for failure to comply with the Court's order of September 23, 1969, which motion was dated October 29, 1969.

* * * * *

24. In denying the defendant's motions to dismiss and for a mistrial as set forth in paragraph 275 of the finding (Record, pp. 213, 219).

6. With Respect to Questions Sought to be Reviewed, No. 6:

a. Excerpt from State Supreme Court Record:

"260. The State introduced as its witness, Edward Miller.

* * * * *

On cross-examination Miller testified that he had given statements to the State Police on February 17, 18 and 21 of 1969 and had also testified before the Grand Jury.

Thereafter the following occurred:

Mr. Hennessey: I would move at this time, your Honor, for copies of any statements in the State's possession with respect to previous statements of Mr. Miller, and also a copy of the transcript of the proceedings in front of the Grand Jury, insofar as it relates to Mr. Miller's testimony.

Mr. Gaffney: If the court pleases, I think the court is aware of our interpretation of Public Act 680, your Honor.

The Court: Well, the jury may be excused.

Thereafter the court ruled in chambers that it would not make an in camera inspection of Miller's testimony, but would require the State's Attorney to do so, and would require the State to turn over any matter which might be of assistance to the accused. The defendant excepted to this procedure and requested that all transcripts of Miller's prior testimony and statements be sealed for review by the Supreme Court, which order was entered after verdict" (Record, pp. 101-2).

b. Excerpt from State Supreme Court Record:

"274. . . .

The State offered as its witness Charles Vernale who, after stating that he had been in State's Prison for 13 months, invoked the Fifth Amendment on three occasions,

the last being when asked if he had given Moynahan a color TV. Vernale had testified previously that he was a friend of Moynahan but also pleaded the Fifth when asked about his relationship with Moynahan. He also took the Fifth when asked if he had ever given Moynahan information with relation to criminal activities of any kind.

Thereafter at the commencement of cross-examination of Vernale, the following occurred:

Mr. Secor: Under the circumstances, we have nothing further of this witness. . . .

Mr. Hennessey: I would ask your Honor first that the State produce all statements in their possession, any signed statements, any copies of any written transcripts given by Mr. Vernale to any official to the State of Connecticut pursuant to Public Act 680, and also under the rule of Judge Barber.

The Court: Mr. Gaffney, do you have any statements relating to the testimony of Mr. Vernale?

Mr. Secor: Well, the State objects to this.

The Court: The objection is overruled.

Mr. Secor: Your Honor, it is going to take a considerable amount of time to segregate out the information that the defense is entitled to under your ruling.

Mr. Hennessey: Excuse me. So my motion will be clear, I have asked for all statements.

The Court: Yes, at this time, Mr. Secor, I am going to order the State to produce all statements.

Mr. Secor: For your Honor's inspection?

The Court: For my inspection. You say it will take some time, Mr. Secor?

With Respect to Questions Sought to be Reviewed, No. 6

Mr. Secor: Well, this is one, and there are more to come.

* * * * *

The Court: Now, gentlemen, the Court at this time will order the State to turn over to Mr. Hennessey, any and all statements made by Mr. Vernale with respect to the subject matter in question, whether they are statements made to the police department or to Justice O'Sullivan in conducting his investigation.

Is there any objection?

Mr. Secor: Now, your Honor, I really don't understand that order, and I don't think I could honestly and in good conscience properly comply with it to your satisfaction.

You said to turn over all statements of Vernale in reference to the matter in question.

Now, you must remember, Vernale has testified a great deal concerning this defendant, and a great deal concerning a lot of other people in the City of Waterbury.

The Court: Then I am going to put the burden on you as the representative of the State, to turn over all matters pertaining to this particular case.

Mr. Secor: Pertaining to matters concerning the defendant, Paul Moynahan?

The Court: That is correct.

Mr. Hennessey: I will take exception to that ruling, your Honor, and renew my motion that I have asked that all statements be turned over pursuant to Public Act 680, all statements given by this witness, and I claim that I either have the right to that under Public Act 680 or, in the alternative, I have the right to have an examination made of those either in camera by the Court, or, I think, more logically, by myself, that is my job to determine upon

the examination of all records any matter which would be pertinent to my cause.

The Court: I am going to include in that order any statements made by Mr. Vernale of an exculpatory or inculpatory nature, insofar as Mr. Paul Moynahan is concerned, or anything which may be of assistance to Mr. Moynahan, or anything which may be of assistance to Mr. Moynahan in defense of this case.

Mr. Hennessey: For example, he may have made numerous statements with respect to witnesses that have previously been here in Court, which matters will be of assistance to us. He may have made statements inconsistent with other testimony.

The Court: I am referring, gentlemen, specifically to *the Giles* vs. *United States* case. I cannot think of the citation now.

Mr. Hennessey: I have it, if you would like it.

The Court: I think the State ought to comply with the ruling in the *Giles case,* particularly with the majority view.

Do you have it, Mr. Gaffney?

Mr. Gaffney: I will have it shortly.

Mr. Secor: I would like at this time to object, and to take an exception to the Court's ruling. Public Act 680 does not require the broad order your Honor has issued, in view of the testimony that this witness, Vernale, has given on the stand, and as I understand it, the Court is not taking the written documents, Vernale's statements, and examining them himself for contradictions, but is strictly ordering the State to just turn it over wholesale to the defense.

With Respect to Questions Sought to be Reviewed, No. 6

The Court: I feel that anything that Mr. Vernale has said which might be of substantial assistance to the defense in this case should be turned over. In other words, it is broader, the ruling that I am making under the *Giles* case, it is broader than the statute provides for in the State of Connecticut.

But, nevertheless, it is my feeling that we are bound by the United States Supreme Court's decisions, and even though they go beyond Rule 680 in this particular case, I am going to do it.

Mr. Secor: We object and except to it with this aside, now, your Honor: The State's Attorney's office is the one that is to make this determination. Is that your Honor's order?

The Court: Well, I will make it this broad so there will be no question about it.

All statements made by Mr. Vernale are to be turned over to Mr. Hennessey.

Mr. Secor: Now, is that a new order?

The Court: Yes.

Mr. Secor: That is, statements regarding other people?

The Court: Everything.

Mr. Secor: Anything that the State has that Mr. Vernale has ever given the State Police or Justice O'Sullivan?

The Court: Yes. If I am incorrect, let the Supreme Court rule on it.

Mr. Secor: Now, I think I should apprise the court that it is within the realm of possibility, maybe probability, the court is not quite aware of what the effects of this last complete broadside order is.

* * * * *

With Respect to Questions Sought to be Reviewed, No. 6

I think it is grossly improper, your Honor, and I am sure you were not conscious of that when you issued that order.

The Court: Just so there will be no misunderstanding, I am going to get the *Giles* case and read from that case, and this will be the order of the court.

Under the ruling in the *Giles* case as expressed by Justice Fortas, ordering the State to disclose evidence in its exclusive possession, which is not merely cumulative or embellishing and which may be of material importance to the defense, regardless of whether it relates to testimony given at the trial.

That is the order of the court.

Mr. Hennessey: I at one time thought that your Honor was going to give us the entire statement.

The Court: Well, I have changed it.

Mr. Hennessey: I just wanted to make sure.

The Court: And the reason I changed that is that it was brought to my attention by Mr. Secor that I was not conscious of the fact that there may be other cases involved here not related to Mr. Paul Moynahan, which might be affected by the order of the court. And this is the reason why I modified it, limited my order in this respect.

Mr. Hennessey: Well, I wish to be heard only as to the point whether or not such testimony may have any bearing on any other case.

I would submit that the State has, through its own witnesses, sought to introduce evidence which would place in this jury's mind the existence of numerous cases through Mr. Bishop. They have also, I believe, through placing Mr. Miller on the stand, brought into the issue the question of several other cases, and finally, by placing Captain Bishop on the stand, they have brought into issue certainly the Moynahan case, the air conditioner.

With Respect to Questions Sought to be Reviewed, No. 6

I think, as I understand the law, absent of showing an articulated showing which your Honor would make, your Honor would rule that certain matters would involve security or danger to individuals, that is the situation where your Honor might exercise a ruling by virtue of an examination which your Honor makes, and then those matters could be sealed and could be made subject to subsequent review by the court.

But since this man has been placed on the stand and since all this evidence has come in previously, I would submit that that evidence is germane to the issues that have been raised by this trial, and that therefore, it should be my right to examine, and my right as an advocate to make the determination as to what evidence in these statements may be of assistance to me in the defense of my case on behalf of my client.

The Court: Let me repeat my order, gentlemen:

The order of this court is that the State is ordered and required to disclose to Mr. Hennessey evidence in its exclusive possession which is not merely cumulative or embellishing and which may be of material importance to the defense, regardless of whether it relates to testimony given at the trial.

That is my order, gentlemen.

* * * * *

Mr. Hennessey: And I object and except * * * (Record, pp. 131-7).

The Court: The State, and for the protection of Mr. Hennessey's rights, the entire record will be marked as an exhibit for identification in the event that future need of it is required * * * (Record, pp. 40-1).

With Respect to Questions Sought to be Reviewed, No. 6

After the verdict all prior statements and testimony of Vernale were sealed by the court and made a part of the record" (Record, p. 137).

c. Excerpt from State Supreme Court Record:

"ASSIGNMENT OF ERRORS

The Court erred:

17. In refusing to grant the defendant's motion for production and inspection of prior statements of State's witnesses Edward Miller and Charles Vernale as stated in paragraphs 260, 261 and 274 of the finding" (Record, pp. 213, 218).

• • • • •

7. With Respect to Questions Sought to be Reviewed, No. 7:

a. Excerpt from State Supreme Court Record:

"MOTION TO QUASH INFORMATION

The defendant respectfully moves the Court for an order quashing the information as to Counts One and Two herein and sets forth, in support thereof, the following reasons:

1. The defendant by information is charged with violations of Sections 54-197 and 53-63 of the Connecticut General Statutes, as amended.

2. In substance the defendant is charged with larceny and conspiracy.

3. The proceedings above were authorized pursuant to Section 54-47 of the Connecticut General Statutes, Revision of 1958, as amended.

4. Said statute creates and limits the authority of any and all persons designated thereunder.

5. Said statute makes no provision for the presence of any persons or officers other than witnesses, judge, referee, state's attorney, other attorneys empowered by the court to examine witnesses, the official stenographer of the court or his assistant.

6. Being a statutory creation the provision in question is limited by its terms and, by rule of construction, the "inclusion of one is the exclusion of others."

7. On May 6, 1969, there was in attendance at said hearing, one Wayne Bishop, a State Police Officer.

8. The attendance of said Police Officer at said hearing was, by clear implication, in violation of the provisions of the statute empowering the grand jury.

9. While in attendance as aforesaid, said police officer exploited the opportunity of overhearing testimony by

With Respect to Questions Sought to be Reviewed, No. 7

noting the evidence of all witnesses, extracting portions therefrom, and filing an affidavit with the State's Attorney upon the basis of which a warrant in the instant case was issued.

The said Bishop further participated illegally in said hearings as he acted as an attorney propounding questions to the witnesses.

10. In so doing he gained clear access to material and evidence which Section 54-47 posits in the exclusive control, custody, and use of the Superior Court *and no others* (emphasis added).

11. In so doing his conduct operated to the sole advantage of the police authorities and to the pronounced prejudice of the defendants.

12. Hence the statute operated to discriminate against the defendant and in favor of the arresting police authorities when in fact and in law no such inequality was contemplated or intended by the Legislature.

WHEREFORE, the defendant moves that all proceedings emanating or flowing from the aforementioned violation of the terms of Section 54-47 be declared null and void and:

A. The affidavit offered in support of the issuance of the Bench Warrant in the instant case be stricken from the record.

B. The information based thereon be quashed and the charges dismissed as to this defendant, as the same are illegal and based upon proceedings violative of the Due Process guaranty of the 14th Amendment to the United States Constitution.

Defendant

By F. OWEN EAGAN
His Attorney

(Filed: Sept. 11, 1969.)

9/23/70 Denied, (Barber, J.)" (Record, pp. 2-4).

With Respect to Questions Sought to be Reviewed, No. 7

b. Excerpt from State Supreme Court Record:

"MOTION TO DISMISS

* * * * *

PART B.

1. This prosecution resulted from an inquiry by a State Referee held pursuant to § 54-47 (Conn. Gen. Stat., 1958 Rev.) by order of this Court, dated March 11, 1969.

2. As a result of the § 54-47 inquiry by the State Referee conducted between March 18, 1969, and June 12, 1969, (a) defendant, with others, was the subject of a public report classifying him as a criminal, without affording trial or procedural safeguards, (b) defendant was a witness against himself without being fully warned of his constitutional rights, (c) defendant was the subject of a report which consciously generated publicity in the community in which he resided, and (d) defendant was the subject of a report resulting from hearings at which other than the State's Attorney and the State Referee were present.

3. Prosecution resulting from the inquiry under these circumstances:

(a) resulted from operation of § 54-47, which is unconstitutional on its face and as applied in that it deprives defendant of his right to confront and cross-examine the witnesses against him, his right to present evidence on his own behalf, his right to the effective assistance of counsel, and his right to be tried in a community free from prejudicial material consciously generated by official conduct, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States and Article I, § 8 of the Connecticut Constitution.

(b) deprives defendant of his privilege against self-incrimination and assistance of counsel, as guaranteed by

With Respect to Questions Sought to be Reviewed, No. 7

the Fifth and Fourteenth Amendments to the Constitution; and

(c) deprives defendant of a hearing conducted with proper persons present.

WHEREFORE, defendant moves to dismiss the information.

Defendant

By F. OWEN EAGAN
His Attorney, appearing specially for purposes of Motion to Dismiss for Lack of Jurisdiction In Personam

(Filed: Sept. 23, 1969.)

ORDER

Sept. 23, 1969

The foregoing Motion, having been duly heard by the Court, it is hereby ordered denied.

By The Court (BARBER, J.)
Francis J. Butler, Clerk"

(Record, pp. 7-9).

c. Excerpt from State Supreme Court Record:

ASSIGNMENT OF ERRORS

The Court erred:

1. In denying the defendant's Motion to Quash Information dated August 29, 1969.

* * * * *

3. In denying the defendant's Motion to Dismiss dated September 19, 1969 * * * (Record, p. 213).

8. With Respect to Questions Sought to be Reviewed, No. 8:

"MOTION TO DISMISS

PART A

1. This prosecution is controlled and directed by the State's Attorney for New Haven County at Waterbury.

2. Pursuant to statute, the State's Attorneys of the State of Connecticut are appointed by the judges of the Superior Court, are responsible to the judges of the Superior Court, and are members of the Judicial Department. § 51-2, § 51-175, § 51-26, § 51-178, §54-75, § 51-12 (Conn. Gen. Stat., 1958 Rev., as amended); § 471, § 472, § 473 Practice Book (1963 Ed.).

3. As a matter of practice, the assignment of criminal cases for the purposes of motions, pleas, trial and disposition is made by the State's Attorney's Office, rather than by the clerk, who does maintain trial assignment lists and make assignments for civil cases, pursuant to provisions of the Practice Book.

4. Prosecution by the State's Attorney for New Haven County at Waterbury as a member of the Judicial Department with the powers and responsibilities enumerated:

(a) violates the separation of powers doctrine of Article II of the Connecticut Constitution and interferes with the operation of the Executive Department, which department, not the Judicial Department, has the function to take care that the laws be faithfully executed pursuant to Article IV, § 12 of the Connecticut Constitution; and

(b) deprives defendant of his right to have the issues in the above cause determined in an adversary, accusatorial proceeding in accordance with the due process of law, as guaranteed by the Fourteenth Amendment to the Constitution of the United States and Article I, § 8 of the Connecticut Constitution.

With Respect to Questions Sought to be Reviewed, No. 8

WHEREFORE, defendant moves to dismiss the information.

* * * * *

Defendant

By F. OWEN EAGAN
His Attorney, appearing specially for purposes of Motion to Dismiss for Lack of Jurisdiction In Personam

(Filed: Sept. 23, 1969.)

ORDER

Sept. 23, 1969

The foregoing Motion, having been duly heard by the Court, it is hereby ordered denied.

By The Court (BARBER, J.)
Francis J. Butler, Clerk"

(Record, pp. 7, 9).

b. Excerpt from State Supreme Court Record:

"ASSIGNMENT OF ERRORS

The Court erred:

* * * * *

3. In denying the defendant's Motion to Dismiss dated September 19, 1969" * * * (Record, p. 213).

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In The Supreme Court of the United States

OCTOBER TERM

No. 73-238

Paul C. Moynahan, Petitioner

v.

State of Connecticut, Respondent

Brief In Opposition To Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Connecticut

Dennis F. Gaffney
Special Assistant State's Attorney
16 West Main Street
Meriden, Connecticut
Attorney for Respondent

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In The Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-238

Paul C. Moynahan, Petitioner
v.
State of Connecticut, Respondent

Brief In Opposition To Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Connecticut

The respondent State of Connecticut respectfully objects to the issuance of a writ of certiorari to review the judgment and opinion of the Supreme Court of the State of Connecticut entered in this proceeding on April 24, 1973 and amended on May 23, 1973.

I. Constitutional And Statutory Provisions

United States Constitution Amendment XIV, Section 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereon, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any

person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Constitution State of Connecticut, Article 1, S. 8:

In all criminal prosecutions, the accused shall have a right to be heard by himself and by counsel; to be informed of the nature and cause of the accusation; to be confronted by the witnesses against him; to have compulsory process to obtain witnesses in his behalf; to be released on bail upon sufficient security, except in capital offenses, where the proof is evident or the presumption great; and in all prosecutions by indictment or information, to a speedy, public trial by an impartial jury. No person shall be compelled to give evidence against himself, nor be deprived of life, liberty or property without due process of law, nor shall excessive bail be required nor excessive fines imposed. No person shall be held to answer for any crime punishable by death or life imprisonment, unless on a presentment or an indictment of a grand jury, except in the armed forces, or in the military when in actual service in time of war or public danger."

Connecticut General Statutes, Section 53-65: Receiving Stolen Goods:

"Any person who receives and conceals any stolen goods or articles, knowing them to be stolen, shall be prosecuted and punished as a principal, although the person who committed the theft is not convicted thereof."

Connecticut General Statutes, Section 54-47: Investigations into commission of crime:

"Whenever it appears to the superior court for any county that the administration of justice requires an investigation to determine whether or not there is probable cause to believe that a crime or crimes have been committed within the county, said court may order an inquiry to be made into the matter, to be conducted before any judge of said court or a state referee designated by it. Such inquiry shall be conducted in public or private as said court orders. The attendance of witnesses and the production of documents at such inquiry may be compelled by subpoena, signed by any official authorized to issue such process. If any witness properly summoned fails to appear or to produce any documents included in such subpoena, or if he fails to answer any proper question, the judge or referee conducting such inquiry may report the matter to the state's attorney for the county wherein the investigation is being conducted and such state's attorney may file a complaint setting forth the facts at any criminal session of the superior court in such county. The court shall thereupon issue a citation to such witness to appear before said court and show cause why he should not be punished as for a contempt, and if, after hearing, the court finds that he failed to appear without due cause or failed to produce any document properly to be presented to the judge or state referee conducting the investigation or failed to answer any proper question in the course of such investigation, it may punish him as it might a witness failing to appear, to produce a document properly to be considered or to answer a proper question before the court. Witnesses

may be examined by the judge or state referee conducting the inquiry or by the state's attorney or by any other attorney or attorneys appointed by the court for such purpose. The official stenographer of said court or his assistant shall record any testimony so taken. At the conclusion of such inquiry the judge or referee conducting the same shall file with the court a report and the court shall direct whether, and to what extent, such report shall be made available to the public or interested parties. Any transcript of testimony taken at such inquiry shall likewise be filed with the court and it shall have the same powers with reference to it as it has with reference to the report; provided any person accused of crime as a result of such inquiry shall have access at all reasonable times to the transcript of his own testimony given by him in such inquiry. (1949 Rev., S 8777; 1953, Supp. S 3324d). General Statutes of Connecticut. Vol. IX, 545 (Revised to 1968).

Connecticut General Statutes; Section 51-175: State's attorneys; assistants; practice of criminal law by assistants and superior court clerks:

"The judges of the superior court shall appoint a state's attorney for each county, who shall act therein as attorney in behalf of the state, a state's attorney at Waterbury, who shall have the same powers and perform the same duties within the judicial district of Waterbury in New Haven county and at all criminal terms of the superior court at Waterbury as the state's attorneys in the several counties as the criminal business of the court may require, who, respectively, shall assist the state's attorneys for said counties and for said district in

all criminal matters and, in the absence from the county or district or disability of the state's attorney or at his request, shall have and exercise all the powers and perform all the duties of state's attorney. Each state's attorney appointed to such position after July 1, 1967, shall devote his full time to the duties of his office, shall not engage in the practice of law and shall not be a partner, member or associate of a law firm. They shall receive annual salaries as follows: Twenty-four thousand dollars for the counties of Fairfield, Hartford, New Haven and New London and twenty-two thousand dollars for the counties of Litchfield, Middlesex, Tolland and Windham, and for the state's attorney at Waterbury. The provisions of this section with respect to each state's attorney devoting full time to the duties of his office and not engaging in the practice of law or being a partner, member or associate of a law firm, shall not apply to any incumbent state's attorney for the term of his appointment or reappointment to any new term or terms, at the election of each such state's attorney. Each such state's attorney who so elects shall have his annual salary reduced by five thousand dollars. Each such state's attorney may terminate such election at any time. The comptroller shall deduct from such salaries five per cent thereof as contributions for the purposes of sections 51-49, 51-175a and 51-175b. No assistant state's attorney and no partner or associate of a law firm of which such attorney is a partner or associate and no clerk of assistant clerk of the superior court shall engage in the private practice of criminal law before the superior court for the county in which such attorney or clerk is engaged. The several state's attorneys and assistant state's

attorneys shall hold office for two years unless sooner removed by said judges. If any state's attorney or assistant state's attorney neglects to annually account for and pay over all moneys of the state received by him, his office shall become vacant; and the chief justice of the supreme court or the chief court administrator, on a certificate from the comptroller of such neglect, shall appoint another attorney or assistant attorney in his place, who shall hold office until the next annual meeting of the judges unless sooner removed by them. Said judges may remove any such attorney or assistant attorney from office and may fill any vacancy caused thereby, and they may fill any vacancy in either of said offices which may occur from any other cause. Any judge holding the superior court in any county in which any such vacancy exists may fill it until the next annual meeting of the judges, unless it is sooner filled by the judges at a special meeting. (1949 Rev., S. 17764; June, 1955, S. 3118d; 1963 P.A. 378; February 1965, P.A. 464; 1967, P.A. 622, S. 1)" General Statutes of Connecticut, Vol. IX, p. 57 (Revised to 1968).

Connecticut General Statutes; Section 54-86(a):

a. Upon motion of a defendant at any time after the filing of the indictment or information, and upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable, the court shall order the attorney for the state to permit that defendant to inspect and copy or photograph any relevant (1) exculpatory information or material; (2) written or recorded statements, admissions or confessions made by the defendant; (3) books, papers, docu-

ments or tangible objects obtained from or belonging to the defendant or obtained from others by seizure or process; (4) copies of records of any physical or mental examinations of the defendant; (5) recorded testimony of the defendant before a grand jury; and (6) records or prior convictions of the defendant, or copies thereof, within the possession, custody or control of the state, the existence of which is known to the attorney for the state or to the defendant.

b. An order of the court granting relief under this section shall specify the time, place and manner of making the discovery and inspection permitted and may prescribe such terms and conditions as are just.

c. A motion under this section may be made only in a criminal case and shall include all relief sought under this section. A subsequent motion may be made only upon a showing of cause why such motion would be in the interest of justice.

Connecticut General Statutes, Section 54-86(b):

a. In any criminal prosecution, after a witness called by the prosecution has testified on direct examination, the court shall on motion of the defendant order the prosecution to produce any statement oral or written of the witness in the possession of the prosecution which relates to the subject matter as to which the witness has testified, and the court shall order said statement to be delivered directly to the defendant for his examination and use.
b. If the prosecution fails to comply with the order of the court, the court shall strike from the record the testimony of the witness and the trial shall proceed unless the court

in its discretion shall determine that the interests of justice require that a mistrial be declared.

Connecticut Practice Book; Section 226:
Objections to Evidence:
"Whenever an objection to the admission of evidence is made counsel shall state the grounds upon which it is claimed or upon which objection is made, succinctly and in such form as he desires it to go upon the record, before any discussion or argument is had. Argument upon such objection shall not be made by either party unless the court requests it and, if made, must be brief and to the point. An exception to the ruling must be taken in order to make it a ground of appeal. (P.B. 1951, Section 155.)" Connecticut Practice Book Rules and Forms p. 132 (Revision of 1963).

II. Questions Presented For Review

1. Was constitutional error committed when a necessary witness, without notice, invoked his privilege against self-incrimination in response to three (3) questions in the presence of the jury, answered numerous other questions, explained the invocation of his privilege, and the court gave cautionary instructions?

2. Was constitutional error committed when the court, in the absence of the jury, listened to testimony regarding alleged bias, interest or motive of a witness, and then ruled that such evidence was inadmissible on the grounds of irrelevancy, immateriality and remoteness?

3. Was constitutional error committed when the court permitted an investigating police officer to testify regarding the contents of a transcribed interview with the defendant?

4. Was constitutional error committed when the court charged the jury pursuant to the standard Connecticut instruction regarding the weight to be accorded the testimony of an accused person?

5. Was constitutional error committed when the court denied a motion to dismiss on the grounds that the state allegedly failed to completely comply with the order of the court regarding pre-trial production of claimed exculpatory material, which material was made available at the time of the trial?

6. Where all statements made by a witness concerning the subject matter of his direct testimony were turned over to the defendant after direct examination, were any rights of the petitioner to a full and fair hearing denied?

7. Was constitutional error committed when the court denied motions to quash and dismiss the information on grounds that the presence of a police officer at a session of the one-man investigatory Grand Jury allegedly violated Section 54-47 of the Connecticut General Statutes and that said section is "unconstitutional on its face and as applied"?

8. Was constitutional error committed when the court denied a motion to dismiss the information on the grounds that Section 51-175 of the Connecticut General Statutes which provides for the appointment of State's attorneys by the judges of the superior court, allegedly violates the Fourteenth Amendment of the United States Constitution and Article I S 8 and Article IV S 12 of the Constitution of the State of Connecticut?

III. STATEMENT OF THE CASE

Late in 1968 two people who were to be instrumental in an investigation of a stolen goods ring in the Waterbury area were languishing in jail. Mr. John Bishop was incarcerated in the Bridgeport Correctional Center and Mr. Charles Vernale was imprisoned at the State Prison in Somers, Connecticut. (Finding 123, P.R. p70)*

On October 25, 1968 Mr. John Bishop gave a written statement to the Connecticut State Police in which he informed them of his relationship with Charles Vernale and Vernale's relationship with the defendant, the deputy superintendent of the Waterbury Police Department. (Finding 124, 257, P.R. pp. 60, 99) Basically, Bishop was a thief who procured stolen merchandise and sold the same through Vernale, the fence. (Finding 4, 8, 9, 10, P.R. p. 60) The defendant was a regular visitor to Charlie Vernale's house and was described by Bishop as "Charlie's man in the Waterbury Police Department." (Findings 18, 21, P.R. p. 61)

Bishop had seen Vernale in the company of the defendant on different occasions at Vernale's house. (Finding 18, P.R. p. 61) In 1966 the defendant had seen John Bishop at Vernale's house and had said to him, "I don't care what business dealings you and Charles have between you. That is your business, but if you ever do anything in Waterbury, I will have to nail you for it." (Finding 19, P.R. p. 61)

On April 8, 1967, Bishop broke into the Martin Appliance Co., located at 126 Middletown Avenue in North Haven, Connecticut and stole a new twenty-two inch maple Motorola Color TV console, Model CL 720CS Serial Number 384498 and another television set. (Finding 1, 2, P.R. p. 60) Bishop loaded these television

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*P.R. - Printed Record in Supreme Court of the State of Connecticut

sets into his truck and took them to the home of Charles Vernale. (Finding 5, P.R. p. 60) Around the end of April or early May, 1967, Bishop helped Vernale load the Motorola taken from Martin's into Vernale's station wagon. (Finding 9, 11, P.R. p. 60) He and Vernale drove to the rear of the defendant's home and carried the set through the kitchen into Moynahan's living room and left it. (Finding 12, 16, P.R. pp. 60, 61) The defendant was present at this time, and perhaps, his wife. (Finding 13, P.R. p. 61) Bishop said nothing other than "Hello" or "Goodbye". (Finding 14, P.R. p. 61) Bishop noticed that the kitchen of the Moynahan home was being remodeled and electrical connectors were protruding from the bare walls on the right hand side of the kitchen. (Finding 15, P.R. p. 61)

In the middle of December, 1968, Captain Wayne Bishop, of the Connecticut State Police, commanding officer of this investigation, notified Superintendent Frederick Sullivan of the Waterbury Police Department that the State Police had information that the defendant had received stolen property. Superintendent Sullivan admitted that he immediately advised the defendant of this information.

Later in December, 1968, Mr. Timothy Moynahan, an attorney from Waterbury and son of the defendant, purchased a new color television for his parent's home.

After interviewing John Bishop, the Connecticut State Police went to the State Prison at Somers where Mr. Charles Vernale was serving a sentence for receiving stolen property. He had pleaded guilty to this charge in 1968 when he was represented by Attorney Moynahan. (Finding 218, P.R. p. 77) Attorney Moynahan admitted that he ceased formal representation of Mr. Vernale in December, 1968. Mr. Vernale agreed to cooperate with the police after he had a chance to talk to his daughter.

On February 3, 1969, Mr. Vernale's ex-wife and his daughter visited him at prison. Vernale told his

daughter to call Paul Moynahan and Attorney Moynahan to tell them to get rid of the gifts that he (Vernale) had given them. (St. App. pp. 82a, 86a)*

Attorney Moynahan admitted that he received such a call from Mr. Vernale's daughter on February 4, 1969 (St. App. pp. 82a, 86) He stated that he immediately went to the State's Attorney Office in Waterbury and advised Attorney Francis McDonald, State's Attorney for New Haven County at Waterbury, regarding an air conditioner that he had received from Mr. Vernale. (Finding 222, P.R. p. 77) Attorney Moynahan consented to having his office searched and a stolen air conditioner was, in fact, found and subsequently removed by the Connecticut State Police. (Finding 223, P.R. p. 78)

On this same date, February 4, 1969, Mr. Charles Vernale gave a recorded statement to the Connecticut State Police in which he admitted delivering a stolen television set to the home of the defendant.

On February 8, 1969, the defendant was invited to talk to State's Attorney Francis McDonald and Captain Wayne Bishop of the Connecticut State Police. (Finding 44, P.R. p. 63) Moynahan was advised of the nature of the inquiry concerning Charles Vernale and his receipt of stolen goods from Vernale. (Finding 46, 87, P.R. pp. 63, 67) The defendant was advised of his rights, waived his right to counsel and gave a recorded statement. (Finding 44, 45, P.R. p. 63) Captain Bishop testified that during this conversation the defendant admitted that he had known Charles Vernale for over ten (10) years as a "fence" and a thief, but nevertheless considered him a friend (Finding 47, 65, 66, 231, P.R. pp. 63, 65, 78): a friend whom the defendant admitted entertaining at his home for Thanksgiving dinner; with whom he had travelled from Florida to Waterbury; with whom he had exchanged furniture,

*St. App. - Appendix to Brief for State in Supreme Court of the State of Connecticut

and with whom he had frequently sailed on his (Vernale's) boat. (Finding 67, 68, 233, P.R. pp. 65, 78) Despite this friendship, the defendant maintained that he would never accept anything from Charles Vernale because of his reputation as a receiver of stolen goods, his criminal record and his activities, and he should have warned his son, Attorney Moynahan, not to accept gifts from him too. (Finding 50, 51, P.R. p. 64)

In this same conversation the defendant admitted knowing John Bishop as a breaking and entering man who brought stolen goods to Vernale. (Finding 47, P.R. p. 63) But the defendant denied that John Bishop and Charles Vernale had delivered a television set to his home and denied that a color television was in his home prior to December, 1968, when his son purchased one. (Finding 53, P.R. p. 64)

Subsequently, in the middle of February, 1969, members of the Connecticut State Police interviewed Mr. Edward Miller, a television repairman in Waterbury. (Finding 144, P.R. p. 70) Mr. Miller recalled receiving a telephone call from the defendant on a Sunday in June, 1967. (Finding 33, 34, 35, 36, P.R. p. 62) He proceeded to the defendant's home where he performed a unique repair on the sound coil of a large, floor model, Motorola 23" color television set, Early American Colonial, maple finish. (Finding 40, 41, 42, P.R. p. 63) Mr. Miller told the police that he soldered a wire within the sound coil, wrapped it with black tape and then replaced the sound coil in a metal shield. (Finding 40, P.R. p. 63) This repair could not be seen when the metal shield was in place (Finding 29, P.R. p. 62) Mr. Miller informed the police that if he saw this television chassis again he would recognize his work because of the unique nature of the repair. (Finding 43, P.R. p. 63)

On March 5, 1969, the Connecticut State Police reinterviewed Charles Vernale at the State Prison and he

affirmed his earlier statement regarding the delivery of a stolen television set to the defendant.

On Saturday, March 8, 1969 a front page story of a Waterbury newspaper reported that the Connecticut State Police were investigating a stolen goods ring in Waterbury that allegedly concerned members of the Waterbury Police Department. (St. App. pp. 86a, 87a)

On Monday, March 10, 1969, Attorney Timothy Moynahan telephoned the State's Attorney Office and stated: "Is that son-of-a-bitch there?" (St. App. pp. 80a, 86a) "Tell him to stay there because I am coming over." (St. App. p. 80a) Attorney Moynahan did, in fact, come to the State's Attorney's Office that morning and strongly criticized State's Attorney McDonald and the Connecticut State Police for the manner in which the stolen goods ring investigation was being conducted. (St. App. pp. 80a, 81a)

At the very same time, the defendant was nervous and upset at the police headquarters. (St. App. pp. 80a, 95a) In fact, Mr. Fred Sullivan, Superintendent of the Waterbury Police Department, gave the defendant a librium pill and then called State's Attorney McDonald to advise him of the defendant's actions and to ask him to get the investigation moving. (Finding 214, P.R. p. 77, St. App. p. 80a)

On that same date, March 10, 1969, Attorney Moynahan wrote a letter to State's Attorney McDonald stating: "This is to confirm our conversation of Monday, March 10th in which I advise you that I was still the attorney for Charles Vernale and that I was requesting that he not be contacted by the State Police." (St. App. p. 86a)

At approximately 7:45 p.m. on the same date, March 10, 1969, the defendant and Henry Byrnes, Chief of Detectives of the Waterbury Police Department and a long time friend of the defendant, went to the home of Sergeant Edward Courtney of the Connecticut State

Police. (Finding 69, 277, P.R. pp. 65, 154) For one month prior to that date Sergeant Courtney had been assigned, with a team of state policemen to investigate a stolen goods ring in the City of Waterbury. (Finding 70, 277, P.R. pp. 65, 154) According to Sergeant Courtney's testimony a heated argument took place in front of his home in the defendant's Cadillac. (Finding 73, 74, 277, P.R. pp. 65, 154) Sergeant Courtney testified that the defendant stated that if Courtney wanted him, he could have him right on the street there. (Finding 75, 277, P.R. pp. 66, 154) During this time the defendant was boisterous and argumentative, yelling and pointing his finger at Courtney. (Finding 74, 277, P.R. pp. 66, 154) Courtney further testified that Moynahan asked if Captain Bishop or State's Attorney McDonald were running the investigation. (Finding 76, 277, P.R. 66, 154) The defendant told Courtney that the State's Attorney was trying to tie Moynahan and Lieutenant Griffin to Vernale as fences and that the State's Attorney was trying to place him with a stolen television set from Vernale. (Finding 77, 78, 277, P.R. pp. 66, 154) Courtney testified that the defendant stated he had plenty of money to get a dozen sets right then and did not need one from Vernale (Finding 79, P.R. pp. 66) He further told Courtney that television sets were small items and insurance companies pay off on them. (Finding 79, P.R. pp. 66, 154) The defendant also said to Courtney, in a loud tone, that policemen should protect policemen, not persecute them. (Finding 81, 277, P.R. pp. 66, 154) The conversation was repeated for twenty-five to thirty minutes and then Moynahan and Byrnes left. (Finding 82, 277, P.R. pp. 66, 154) The defendant had never been to Courtney's home before. (Finding 83, 277, P.R. pp. 66, 155)

Later that same night, at 1:30 a.m. on March 11, 1969, the defendant and Inspector Byrnes went to the home of State's Attorney McDonald in Middlebury, Connecticut. (Finding 84, P.R. p. 66) Troopers Brodeur and Caputo of the Connecticut State Police testified

regarding their observations when they responded to a call for assistance at 1:50 a.m. on said date. (Finding 84, 99, 278, 280, P.R. pp. 66, 67, 157, 164) Trooper Brodeur testified that when he arrived he saw Moynahan and Inspector Byrnes outside the McDonald home. (Finding 278, P.R. p. 157) He said that the defendant told him he just came to talk to McDonald as he and McDonald were friends but that the latter, to whom he referred to in obscenities, didn't have the guts to talk to him. (Finding 100, 278, P.R. pp. 68 157) Byrnes stated to Brodeur in the presence of Moynahan that Byrnes wanted to talk to McDonald about the investigation, referring to both the investigation and McDonald in obscenities. (Finding 103, 278, P.R. pp. 68, 158) Trooper Caputo corroborated Trooper Brodeur's observations, describing Moynahan as excited but neat, with a moderate ordor of alcohol. (Finding 280, P.R. p. 164)

State's Attorney Francis M. McDonald testified that on March 11, 1969 at approximately 1:30 a.m. he and his family were asleep when Moynahan and Byrnes arrived at their home. (Finding 89, 281, P.R. pp. 67, 165) He said that Moynahan banged on the side porch and when McDonald asked who it was, Moynahan called up to McDonald's second floor bedroom window: "It's Paul Moynahan. I want to see. I want to talk to you." (Finding 90, 281, P.R. pp. 67, 165) Moynahan looked strange and wild and spoke in a loud, challenging voice. (Finding 91, 281, P.R. pp. 67, 165) McDonald got away from the window and went to the telephone. There was a loud pounding on the door downstairs and Moynahan was shouting in a loud voice, "Frank, Frank, I want to talk to you. Come down. Come down, you hero, you. Come down." (Finding 92, 281, P.R. pp. 67, 165, 166) The State's Attorney testified that this pounding, banging and shouting continued as he called the State Police at Bethany Barracks and the Middlebury Police. (Finding 93, 281, P.R. pp. 67, 166) In fact, the pounding and yelling by the defendant continued the entire time after McDonald got up until

the police cruisers arrived at the house some twenty minutes later. (Finding 98, 99, 281, P.R. pp. 67, 166) State's Attorney McDonald stated that Moynahan had never been at his home before that date. (Finding 101, 281, P.R. pp. 68, 166) There was evidence that Moynahan came to McDonald's home to intimidate him in the presence of his wife and children from doing his duty as State's Attorney. (Finding 107, 281, P.R. pp. 68, 166)

The day after these altercations, on March 11, 1969, the Honorable Milton Meyers appointed Justice P. B. O'Sullivan to act as a one man Grand Jury to investigate a stolen goods ring in the Waterbury area.

On March 18, and March 29, 1969, Attorney Timothy Moynahan visited Mr. Charles Vernale, a prospective witness of the said Grand Jury investigation, at the State Prison in Somers, Connecticut.

On March 27, 1969, a smashed, demolished, large, floor model, 22" Motorola color television set, early American, Colonial, maple finish was found by a truck driver in a wooded area near the Waterbury-Terryville city line. (Finding 23, 24, 26, 27, P.R. pp. 61, 62) This area is approximately 6.8 miles from the home of the defendant. (Finding 24, P.R. p. 61) Local police contacted the State Police who checked the serial number of this set and found that it was stolen from Martin's Appliance Store in North Haven, Connecticut on April 8, 1967. (Finding 1, 2, 3, 27, P.R. pp. 60, 62) Mr. Miller, the television repairman, was asked by the State Police to inspect this set. He did so, on the 1st and 2nd of April, 1969 and positively identified it as the set which he had repaired at the defendant's home. (Finding 39, 43, P.R. pp. 62, 63) He identified it by the unique nature of the work which he had performed on it. (Finding 43, P.R. p. 63) He also informed the State Police, with detailed accuracy, exactly what would be found when the metal shield was removed from the sound coil. (Finding 43, P.R. p. 63) Subsequently, on

April 3, 1969, the metal shield was removed by members of the Connecticut State Police and disclosed exactly what Mr. Miller had predicted, i.e., a black tape which supported soldered wires. (Finding 28, 29, 30, 31, 32, P.R. p. 62) This was a most unusual repair according to an expert witness and one which a repairman would vividly recall. (St. App. p. 104a)

During this time, the Grand Jury investigation was continuing. On April 1, 1969, Charles Vernale was called as a witness and, after conferring with his lawyer, Attorney Timothy Moynahan, he repudiated his prior statements and denied delivering a stolen television set to the defendant (St. App. p. 87a) Justice P. B. O'Sullivan, the investigating Grand Jury, asked Mr. Vernale if he (Vernale) thought he was using good judgment in having Attorney Moynahan as his counsel when suspicion was being directed toward Attorney Moynahan and his father, Paul Moynahan, concerning some criminal activity. Vernale responded that he didn't know who else to turn to since Attorney Moynahan had been representing him right along. (Tr. of Grand Jury, Vol. IV, April 1, 1969, pp. 394-400)

Two days later on April 3, 1969, Mr. Vernale came before the Grand Jury again and this time he affirmed his previous statements to the police and admitted delivering a stolen television set to the defendant. He admitted that he had lied in his previous testimony to the Grand Jury. He stated that because of his relationship with Paul Moynahan he didn't have the heart to implicate him. However, after he learned that Mr. Moynahan had stated that he (Moynahan) had used Vernale as an informer he changed his mind and decided to tell the truth. (Tr. of Grand Jury, Vol. VI, April 3, 1969, pp. 565-566)

On April 15, 1969, the defendant pleaded guilty to a charge of Breach of Peace for his conduct at the McDonald's home on March 11, 1969. (St. App. pp. 98a, 99a, 106a)

On May 6, 1969, the defendant testified before Justice P. B. O'Sullivan, the investigating Grand Jury. (Finding 55, P.R. p. 64) At that time the defendant admitted that there was a color television in his home prior to December, 1968. (Finding 56, 194, P. R. pp. 64, 75) He testified that he had borrowed a 23" mahogany Motorola console television set from Mr. Anthony Caggiano. (Finding 57, 59, P.R. p. 64) Mr. Moynahan stated that Mr. Caggiano was now dead. (Finding 60, P.R. p. 60) He also recalled that there was color problems but not sound problems with this borrowed television. (Finding 58, P.R. p. 64) Mr. Moynahan told the Grand Jury that he called three different repairmen to fix this set, one of whom was Edward Miller, a man he had met at Vernale's house. (Finding 61, P.R. p. 64) The defendant admitted that Mr. Miller came to his home on a Sunday in 1967 to repair the set. (Finding 61, 62, 63, 277, P.R. pp. 64, 78) The defendant remembered paying a total of twenty dollars ($20) to the three repairmen to fix a set he didn't own. (St. App. pp. 91a, 92a) Finally, he admitted that he neglected to inform State's Attorney McDonald and Captain Bishop regarding this television when they interviewed him on February 8, 1969 (St. App. p. 94a)

In June, 1969, the findings of the Grand Jury were completed and thereafter a bench warrant was issued and the defendant was arrested on charges of Conspiracy to commit larceny in excess of $250.00 but less than $2,000.00 in violation of Section 54-197 of the Connecticut General Statutes and Larceny in excess of $250.00 but less than $2,000.00 in violation of Section 53-63 of the Connecticut General Statutes.

On September 11, 1969, the defendant filed the following motions: (1) Motion To Quash the Information because Captain Bishop attended a session before the Grand Jury; (2) Motion For Change of Venue because of allegedly inflammatory pretrial publicity in Water-

bury newspapers; and (3) Motion For Production And Inspection. The first two motion were denied by Judge Barber and the final one was granted in part.

On September 23, 1969, the defendant filed a Motion To Dismiss upon the grounds that: (A) Prosecution by the State's Attorney's Office is unconstitutional; (B) Section 54-47 of the Connecticut General Statutes which authorizes the one-man Grand Jury is unconstitutional. This motion was denied by the Court (Barber, J.).

November 1, 1969, the defendant filed a Motion To Dismiss for the alleged failure of the State to comply with the orders of the Court regarding the defendant's Motion For Production And Inspection. This motion was denied on November 25, 1969 by Judge Barber.

On January 8, 1970, the defendant field a Motion For Immediate Trial.

On January 13, 1970, the State filed a Bill of Particulars and Substitute Information, charging the defendant with receiving stolen goods in violation of Section 53-65 of the Connecticut General Statutes.

After the selection of a jury of twelve (12) the trial commenced on January 15, 1970.

The State's case consisted of evidence of the theft of the television set from Martin's Appliance Co. in North Haven on April 8, 1967; admission of said theft by the thief, John Bishop, and his testimony regarding the ultimate delivery of said set into the defendant's living room. (St. App. pp. 4a, 5a) Evidence was introduced regarding the discovery of a demolished television set on March 27, 1969 in a desolate area in the Terryville section of Plymouth, 6.8 miles from the defendant's home. (St. App. p. 18a) Next, Edward Miller, the television repairman, testified regarding the unique repair which he had performed on the sound coil in the defendant's television set in the defendant's home in

the summer of 1967. (St. App. pp. 21a, 22a) He positively identified the set found in Terryville as the set upon which he had made the repair. (St. App. pp. 22a, 29a) Miller's testimony was bolstered by the fact that he had described the unique repair in detail before the set was even discovered, and when it was found, he predicted precisely what would be found when a metal shield, which was covering the sound coil, was removed. (St. App. pp. 22a, 23a) When the shield was removed, the repair uncovered corresponded in every detail with Miller's prediction. (App. pp. 21a, 22a, 30a, 31a)

Captain Wayne Bishop of the State Police testified regarding an interview with the defendant on February 8, 1969, and the testimony of the defendant before the Grand Jury on May 6, 1969. (St. App. pp. 32a, 33a) The State offered evidence of consciousness of guilt of the defendant through the testimony of Sergeant Edward Courtney of the Connecticut State Police, two Connecticut State Police troopers and State's Attorney and Mrs. Francis M. McDonald regarding the conduct of the defendant at the Courtney and McDonald homes on the evening of March 10, and early morning hours of March 11, 1969. (St. App. pp. 73a-82a)

Finally, to corroborate the testimony of Captain Bishop and the defendant that repairs in the Moynahan home were being made at the same time that Attorney Moynahan was renovating his office on Gaffney Place in Waterbury, the State introduced a certified copy of building permit number 4422C dated May 2, 1967, issued to Timothy Moynahan by the Building Department of the City of Waterbury. (St. App. pp. 82a, 83a)

The defendant's case consisted of testimony from Attorney Timothy Moynahan that there was a color television set in his parent's home in June or July of 1967, but it was not the set found in Terryville. (St. App. p. 83a) He also reviewed his representations of

Charles Vernale and his own involvement in the investigation by the Connecticut State Police of the stolen goods ring in Waterbury (St. App. pp. 93a-85a)

Then the defendant Paul Moynahan, took the stand in his own behalf and testified that in the summer of 1967 he had a color television set in his home which he had received from Mr. Tony Caggiano, a deceased television repairman. (St. App. p. 89a) The defendant stated that this set was a secondhand set which Caggiano left in his home to try out, but it was not the set in evidence. (St. App. pp. 89a, 90a) According to the defendant, this set had problems in that the colors would run and it would get hot. (St. App. p. 90a) At the defendant's request it had been repaired by three television repairmen: Mr. Caggiano, Mr. Frank Maiola and Mr. Edward Miller. (St. App. p. 90a) The defendant admitted that he met Mr. Miller through the same Charles Vernale who the state claimed gave Moynahan the television set. (St. App. pp. 90a, 92a) The defendant acknowledged that he had asked Miller to repair this set on a Sunday in the summer of 1967, but denied that the repair was to the sound coil on the set. (St. App. p. 92a) He also denied ever receiving a color television set from Charles Vernale. (St. App. p. 90a)

The defendant admitted knowing Charles Vernale for over ten (10) years as a "fence" and a thief, but nevertheless considered him a friend. (Find. 47, 65, 66, 231, R. pp. 63, 65, 78) Despite this friendship, the defendant maintained that he would never accept anything from Charles Vernale because of his reputation as a receiver of stolen goods, his criminal record and his activities. (Finding 50, 51, 230, 234, P.R. pp. 64, 78) The defendant acknowleged being present in 1965 when three stolen television sets were removed from the home of Charles Vernale by members of the Waterbury Police Department. (Finding 65, 199, P.R. pp. 65, 76) An he admitted knowledge of the criminal records

of Charles Vernale (which includes a 1962 conviction for possession of obscene films and a 1965 conviction for pool selling) and John Bishop (which includes four convictions for breaking and entering and two convictions for larceny). (Finding 64, 119, 230, P.R. pp. 65, 69, 78)

Regarding his conduct on the evening of March 10, 1969, at Sergeant Courtney's house, the defendant told an entirely different version of that meeting, saying that "there was no boisterous conversation whatsoever." (St. App. p. 96a) He denied most of the statements attributed to him by Sergeant Courtney and called Courtney a "liar", a "brazen liar." (St. App. pp. 97a, 98a)

Concerning the incident at the home of State's Attorney McDonald, the defendant admitted driving there, but disputed the time, claiming it was around midnight rather than 1:30 a.m. as the state's witnesses had testified. (St. App. p. 97a) He denied being drunk. (St. App. p. 98a) He testified that he didn't pound on the door and didn't yell "Come down, you hero, come down", but merely knocked on the door and when Mr. McDonald came to the upstairs window Moynahan said: "I would like to tak to you Frank." (St. App. p. 98a) According to Moynahan's testimony, he and Inspector Byrnes just stood by patiently after this, talking between themselves while waiting for Mr. McDonald. (St. App. p. 98a) The next thing they knew, the police arrived. (St. App. p. 98a) Moynahan testified that the testimony of the troopers was "incorrect" and the McDonald's were "mistaken" in their recollection of the incident. (St. App. p. 98a) Finally, the defendant testified that his plea of guilty to a charge of Breach of Peace as a result of his actions at the McDonald home was an involuntary plea because he was forced into it by threats of the State's Attorney for New Haven County. (St. App. pp. 98a, 99a)

Next, the defense called Frank Maiola, a Waterbury television repairman, who testified that he repaired a television set in the home of the defendant in the summer of 1967. (St. App. p. 99a) He said that he never notices the makes or models of the televisions upon which he works, but he does recall a "little burn mark" on the chassis of the television which he repaired at the defendant's home. (St. App. p. 99a) He did not see such a mark on the television in evidence. (St. App. p. 99a) On cross-examination, Mr. Maiolo acknowledged that the mark he saw was a black carbon mark which usually covers a little scorch on the chassis. (St. App. p. 101a) Since he did not wipe off the carbon he could not say whether such a scorch was made on the television set which he repaired in the defendant's home. (St. App. p. 101a) More importantly, at the conclusion of his testimony, Mr. Maiolo acknowledged that he had told an untruth under oath regarding whether he had discussed his testimony with anyone. (St. App. pp. 101a-103a) Initially he stated he had not, specifically denying a discussion with Attorney Moynahan. (St. App. p. 100a) Later, however, he admitted Attorney Moynahan had telephoned him the night before and discussed his testimony. (St. App. p. 102a)

The defense called Dr. Paula Moynahan, daughter of the defendant, who testified that she was present when Mr. Caggiano delivered a color television set to the Moynahan home. (St. App. p. 103a) She described Caggiano as having grayish black hair. (St. App. p. 103a)

The defense also called friends of Attorney Moynahan who allegedly had watched television in the Moynahan home and testified that the television they watched was not the television in evidence.

Finally, the defense called numerous character witnesses for the defendant including several Waterbury police officers and the mayor and three former mayors of the City of Waterbury.

In rebuttal, the State called Leon Kramer, an expert in electronics and specifically television, who testified that in his opinion the repair to the sound coil on the television in evidence is not a normal repair. (St. App. p. 104a) Furthermore, based on his training and experience, he believed that a repairman who performed such a unique repair would recognize his work product. (St. App. p. 104a)

Next, to rebut the defendant's testimony that he arrived at the McDonald home at midnight, the State called the trooper who was desk officer at Bethany Barracks on the midnight shift on March 11, 1969. According to the police log on that date, a call was received from State's Attorney McDonald on March 11, 1969 at 1:30 a.m. (St. App. p. 105a)

Next, the State called Mrs. Tony Caggiano, wife of the man who allegedly loaned a defective color television to the defendant in the summer of 1967. Mrs. Caggiano testified that her husband died on June 12, 1968 and that prior to his death he worked exclusively on black and white televisions. (St. App. p. 105a) Contrary to Miss Paula Moynahan's testimony, she described her husband as bald. (St. App. p. 105a)

The bookkeeper at Mr. Caggiano's former place of business was called and testified that during 1966, 1967 and 1968 the business did not have any second-hand Motorola color television sets and therefore could not have loaned out such a set. (St. App. p. 105a) She also testified that Mr. Caggiano was "bald", "really bald". (St. App. p. 106a)

Finally, to contradict the defendant's claim regarding an involuntary guilty plea to the breach of peace charge arising out of the defendant's conduct at the residence of State's Attorney McDonald in the early morning hours of March 11, 1969, the State introduced a certified copy of the transcript of the change of plea proceedings before the Superior Court (MacDonald, J.) in New Haven. Said transcript reflects the following colloquy: "The Court: You have done so (pleaded guilty) voluntarily without any promise, threat, or anything else? "The Accused: Yes, sir." (St. App. p. 106a)

On February 4, 1970, the jury returned a verdict of guilty. On the same date, the defendant filed a Motion For Judgment Under Rule 255. This motion was denied on March 6, 1970 by Judge Zarrilli.

On March 6, 1970, the defendant was sentenced to the custody of the Commissioner of Correction at Somers for a term of not less than one year and one day nor more than two years and fined $500.00.

He appealed to the Supreme Court of the State of Connecticut. On April 24, 1973 the Connecticut Supreme Court entered judgment affirming the conviction of the defendant. On April 30, 1973 a motion to reargue was filed and on May 25, 1973 the same was denied.

The defendant's petition for a writ of certrorari requests a review of the judgment and opinion of the Supreme Court of the State of Connecticut which is annexed to the petition.

IV. ARGUMENT OF LAW

Question 1: The State requested the court to call as the court's witness, Mr. Vernale, who had already been identified by various State witnesses as the "fence" for John Bishop's stolen merchandise, (St. App. pp. 33a, 36a), a friend and informant of the defendant (St. App. pp. 36a, 93a), and the person who assisted Mr. Bishop in delivering the stolen television set in question to the defendant's home. (St. App. p. 5a) The State claimed this rather unusual procedure was necessary because Mr. Vernale was a witness who would ordinarily be called to prove the State's theory of the crime, but one who had given previous contradictory statements regarding the defendant's involvement. (P.R. pp. 125, 126) As a result, the State represented to the court that it could not vouch for the veracity of Vernale and asked the court to call him as its witness. (P.R. p. 125)

The court entertained argument on this question in the absence of the jury. During said argument the defendant moved the court to make inquiry in the absence of the jury to determine if Mr. Vernale was going to invoke his Fifth Amendment privilege. (P.R. p. 127) The court denied this motion and the defendant took an exception. (P.R. p. 128) This is the only objection or exception which the defendant asserted regarding the testimony of Mr. Vernale. (St. App. pp. 46a-49a) The defendant did not object or take an exception to any of the three (3) questions asked of Mr. Vernale to which he invoked his testamentary privilege. It is respectfully submitted that the defendant did not object because he believed the witnesses' answers might be beneficial to him. After the trial, having acquired the wisdom of hindsight, for the first time he claimed the witnesse's invocation of the privilege against self-incrimination was prejudicial to him. He also made the preposterous assertion that the "breadth" of the court's ruling on his earlier motion

regarding the invocation by Vernale of his Fifth Amendment privilege in the jury's presence "precluded any further objection." (Def's. State Brief, p. 33) Such a position is untenable. The state procedure to be followed before a ruling will be made a ground of appeal is clearly established (Connecticut Practice Book S 226) and the Supreme Court of the State of Connecticut has consistently upheld the same. **Budney vs. Ives**, 156 Conn. 83, 91 (1968); **Skinner vs. Skinner**, 154 Conn. 107, 110 (1966); **Sears vs. Curtis**, 147 Conn. 311, 313 (1960); **Presta vs. Monnier**, 145 Conn. 694, 703 (1958); **Gerrieri vs. Merrick**, 145 Conn. 432, 435 (1958). The present claim was not made to the trial court and therefore it never had an opportunity to pass upon the same. Although the Connecticut Supreme Court could have denied this claimed error on this basis alone, (Dec. Def's App. 22b), it examined the merits of this question.

This legal issue was actually resolved prior to Mr. Vernale taking the stand. In the absence of the jury, a colloquy occurred which clearly established that the state had no prior knowledge of what Mr. Vernale was going to say. Although the petitioner has omitter relevant portions of this colloquy in his appendix to this court, the state has inserted the same in the appendix hereto. (App. pp. 1A-5A)

The fact that the State had no prior knowledge that Mr. Vernale would invoke the privilege against self-incrimination is determinative of this issue. In the leading case of **Namet vs. United States**, 373 U.S. 179, 83 S. Ct. 1151, 10 L. Ed. 2d 278 (1968), the Supreme Court (Stewart, J.) stated:

> "None of the several decisions dealing with this question suggests that reversible error is invariably committed whenever a witness claims his privilege not to answer. Rather, the lower courts have looked to the surrounding circumstances in each case, focusing pri-

marily on two factors, each of which suggests a distinct ground of error. First, some courts have indicated that error may be based upon a concept of prosecutorial misconduct, when the Government makes a conscious and flagrant attempt to build its case out of inferences arising from use of the testimonial privilege. This seems to have been one of the principal reasons underlying the finding of reversible error in **United States vs. Maloney supra.** In that case, the prosecution admitted knowing that two of its key witnesses could validly invoke the privilege against self-incrimination and intended to do so. The prosecutor nevertheless called and questioned them. The court also found that the Government's closing argument attempted to make use of the adverse inferences from their refusals to testify. See also **United States vs. Tucker**, 3 Cir., 267 F. 2d.

"A second theory seems to rest upon the conclusion that, in the circumstances of a given case, inferences from a witness' refusal to answer added critical weight to the prosecution's case in a form not subject to cross-examination, and thus unfairly prejudiced the defendant. This theory seems also to have been present to some extent in the **Maloney** decision, where the court noted the challenged inferences were the only corroboration for dubious and interested testimony by the Government's chief witness. 262 F. 2d at 536-537. On the other hand, courts have failed to find reversible error when such episodes were "no more than minor lapses through a long trial." **United States vs. Hiss**, 185 F. 2d 822, 832 (C.A. 2d Cir.) See also **United States vs. Amadio**, 215 F. 2d 605, 614 (C.A. 7th Cir.), and even when the objectionable inferences

> might have been found prejudicial, it has been held that instructions to the jury to disregard them sufficiently cured the error."

In the present case the defendant appears to contend that error was committed under the first theory. (Def's. State Brief pp. 30-35) He claims that the State should have known that Vernale was going to invoke the Fifth Amendment, but questioned him nevertheless. He also argues that failure to cease questioning after the witness initially invoked the privilege against self incrimination smacks of bad faith. (Def's State Brief p. 33)

In the first place, the record does not support any inference of prosecutorial misconduct. (Dec. Def's App. p. 23b) Rather, it reflects full disclosure of this question in advance of the appearance of Vernale. It further shows full discussion of the merits of this issue, the procedure to be followed, and acquiescence therein by counsel for the defendant. (St. App. pp. 41a-45a) If such conducts amounts to prosecutorial bad faith, one wonders what the state must do to show good faith.

> As noted by the Supreme Court of the State of Connecticut:
>
> "That portion of the defendant's brief relating to this claim is devoted chiefly to the conduct of the state's attorney. The record does not support any inference of prosecutorial misconduct. There was full disclosure in advance of Vernale's appearance and full discussion of the merits of the issue and procedure to be followed. The state was in a dilemma in that Vernale was a witness that the state would naturally produce and one whom it had power to produce and his absence would be subject to an unfavorable inference under the rule as set forth in **Secondino vs. New Haven Gas Co.**, 147 Conn. 672, 675, 165 A. 2d 598; **Queen vs. Gagliola**, 162 Conn. 164, 168, 292 A. 2d 890; see also **United States vs. Gernie**, 252 F. 2d

664 (2d Cir.). The state revealed that it could not know to what Vernale would testify and when the witness did refuse to testify the state did not continue to seek answers involving the issue of the television set on which the witness had claimed the privilege. The state's action in the case before us was a far cry from that of the prosecution in **Douglas vs. Alabama**, 380 U.S. 415, 85 S. Ct. 1074, 13 L. Ed. 2d 934, relied on by the defendant. The **Douglas** case involved flagrant impropriety on the part of the prosecutor who read an accomplice's confession bit by bit in the form of questions, pausing to ask the witness after each piece: "Did you make that statement?" and thereby compelling repeated reliance on the witness' claim of privilege.

"Viewing the entire record, the possible inferences from Vernale's refusal to testify did not add critical weight to the state's case in a form not subject to cross-examination, especially when asked directly why he refused to answer, demonstrate that the state was not using Vernale's invocation of the privilege in an improper manner. Furthermore, it cannot be said here that these claims of privilege were the only source or the chief source of the inference of criminal activity. **Namet vs. United States**, supra, 189; **United States vs. Jenkins**, 442 F. 2d 429 (5th Cir.); **United States ex rel. Fournier vs. Pinto**, 408 F. 2d 539 (3d Cir.), habeas corpus granted due to a combination of the prosecutor's misconduct and error in the charge. The court's cautionary charge on this issue to the jury was curative of any prejudice which might possibly have arisen because of this witness' claim of privilege. No error was committed in allowing the testimony of Vernale to the extent it was give." (Dec. Def's App. pp. 23b, 24b)

Question 2: The defendant claims the trial court unreasonably limited the cross-examination of Edward Miller on the issue of Miller's interest or motive for testifying. (Def's. State Brief, pp. 18-27) As a matter of fact, the court was extremely liberal in its ruling regarding the scope of cross-examination of Mr. Miller.

On cross-examination, Mr. Miller's recollection regarding the repair of the television set in the defendant's home was throughly explored. He was quizzed regarding the time of the repair, the day, the date, the clothing he wore, even what he had had for breakfast that day. (St. App. p. 23a) Of course, Mr. Miller was also questioned regarding the minutest details of the repair which he had made. (St. App. pp. 23a, 24a)

The cross-examination also elicited information regarding other repairs and other sales of television sets by Mr. Miller during 1967. (St. App. pp. 25a, 26a) The defendant used three statements which Mr. Miller had given to the police as well as his testimony before the Grand Jury in an elaborate and exhaustive attempt to impeach and discredit his testimony. (St. App. pp. 26a-28a)

Finally, over the State's objection, Mr. Miller answered questions regarding his relationship to Charles Vernale. (St. App. pp. 25a, 27a) He told how he had performed work for Mr. Vernale on three occasions and how he had fixed television sets for two friends of Vernale. (St. App. pp. 25a-27a) In addition, Mr. Miller testified that he had sold two television sets which he had received from Vernale; one to a Mr. Stevens and the other to a Mr. Gaspari. (St. App. pp. 25a, 26a) When the cross-examination sought to elicit details of Mr. Miller's business records regarding these sales, the court sustained the State's objection, ruling that such an inquiry would be too remote to the issues of the case.

Of course, a trial court has wide discretion in its rulings on the relevancy of evidence. **State vs. Mah-**

mood, 158 Conn. 536, 265 A. 2d 83 (1969; **State vs. Towles**, 155 Conn. 516, 523, 235 A. 2d 639 (1967); **State vs. Keating**, 151 Conn. 592, 592, 200 A. 2d 724; Cert denied 379 U.S. 963 (1964); **State vs. Bassett**, 151 Conn. 547, 551, 200 A. 2d 473 (1964); **State vs. Luzzi**, 147 Conn. 40, 46, 156 A. 2d 505 (1959). It is a reasonable exercise of judicial discretion to exclude questions which would introduce "issues foreign to the case at bar and of no substantial importance." **State vs. Dortch**, 139 Conn. 317, 325 (1952); or evidence the relevancy of which "may be slight and inconsequential that to admit it would distract attention which should be concentrated on other evidence which bears directly on vital points. **State vs. Bassett**, supra at 551.

Under the facts of the present case, the court granted every opportunity to the defendant to show that Mr. Miller was somehow linked to Charles Vernale and thus, presumably, could not be believed. The defendant made good use of this broad exercise of discretion in his favor, but was unable to convince the jury of Mr. Miller's alleged untruthfulness.

Question 3: Through Captain Wayne Bishop of the Connecticut State Police the State offered testimony regarding an interview with the defendant on February 8, 1969. (Finding 44, P.R. p. 63) This interview was conducted at the State's Attorney's Office in Waterbury in the presence of State's Attorney McDonald, Superintendent Sullivan of the Waterbury Police Department, and Sergeant Sullivan and Corporal Smith of the Connecticut State Police. (St. App. p. 32a) A tape recording was made of the interview and subsequently a verbatim transcript was compiled and delivered to the defendant prior to the trial. (St. App. p. 35a)

The defendant objected to this testimony of Captain Bishop claiming that the verbatim transcript was the best evidence of the interview and therefore oral testimony concerning it was inadmissible. The trial court properly overruled the defendant's objection.

The defendant's claim overlooks the distinction which exists in a case in which proof of a document is essential and a case in which the document is only collaterally involved. The best evidence rule has no application to the present case because the essential fact to be established through the testimony of Captain Bishop was neither the existence nor the contents of the interview itself to which the writing is merely collateral or incidental. **Monroe vs. United States**, (A. D. C.) 234 F. 2d 49, 54; **Farr vs. Zoning Board of Appeals**, 139 Conn. 577, 582 (1953); **Kilpatrick vs. Kilpatrick**, 123 Conn. 218, 225 (1937); **Matthews vs. Livingston**, 86 Conn. 263, 273 (1912); 29 Am. Jur. 2d Evidence 449, 450; see 4 Wigmore, Evidence (3d Ed.) S 1246. As the Supreme Court of Connecticut observed:

> "The questions sought to discover what the witness had said during the interview. Anyone who has heard an oral statement made and remembers it may testify to what was said. **Brzezinski vs. United States**, 198 F. 65 66 (2d Cir . . . While recordings might be more accurate and reliable evidence under ordinary circumstances than testimony from memory, the latter is not rendered incompetent by the fact of the existence of the former. **People vs. Kulwin**, 102 Cal. App. 2d 104, 226 P. 2d 657."

Question 4: In the present case the court used the standard Connecticut instruction to the jury regarding the weight to be accorded the defendant's own testimony. See Wright, **Connecticut Jury Instructions** (Vol. II) S 669; **State vs. Guthridge**, 164 Conn. (34 Conn. L.J. No. 26, pp. 1, 3); **State vs. Cari**, 163 Conn. 174 (1973); **State vs. Palko**, 122 Conn. 529, 534 (1937); **aff'd** 302 U. S. 319 (1937), **State vs. Schleifer**, 102 Conn. 708, 725 (1925); **State vs. Saxon**, 87 Conn. 5 21 (1913); **State vs. Fiske**, 63 Conn. 388, 392 (1893).

It is respectfully submitted that this standard charge is in line with the view of the majority of courts throughout the United States. Furthermore, most of the decisions adopting a contrary view can be distinguished from the instant case by the very wording of the instructions in question. In the principal case cited by the defendant, **Iowa vs. Bester**, 167 N.W. 2d 705 (Iowa, 1969), the court charged:

> "In considering and weighing his testimony **you are not required to receive the testimony of the defendant as true**, but to give it full and careful consideration, and determine whether it or any part of it is true or false, and **whether such testimony is given by** the defendant in good faith or **for the purpose of avoiding conviction.**" (emphasis added)

Obviously such an instruction singles out the defendant for comment and does not mention other witnesses. This is not the situation in the instant case, for in this portion of the charge the court concluded:

> "An accused person, having become a witness, stands before you **just like any other witness**, and is entitled to the same consideration and must have his testimony measured in the same way as **any other** witness, including however, his interest in the verdict you are to render." (emphasis added) P.R. p. 82)

Indeed, an examination of the entire charge in the instant case shows that the court gave clear instructions on the presumption of innocence and the burden of proof at the very beginning of its charge (St. App. 113a, 114a) In addition, the testimony of the defendant was not singled out for the court also commented on the weight to be accorded the testimony of police officers, admitted prejurers and convicted felons.

Question 5: The rulings of the state courts regarding pre-trial production of claimed exculpatory material in this case conforms to the law of criminal discovery in Connecticut and is consistent with the decisions of this Court. Section 54-86(a) of the Connecticut General Statutes establishes what information or material shall be available to a defendant prior to trial. In the present case the court followed the mandate of this statute when it ordered the state to produce the written or recorded statements of the defendant and any exculpatory information which the State had in its possession. (P.R. pp. 13, 139)

Neither Section 54-86 (a) nor **Brady vs. Maryland**, 373 U. S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215, upon which the defendant relies, requires disclosure of statements of witnesses prior to trial. On the contrary, in the widely quoted case of **United States vs. Manhattan Brush Co.**, 38 F.R.D. 4, the court held that **Brady, supra** did not require a pretrial disclosure of the Government's case and the statements of witnesses could be obtained only after the witness had testified. This is precisely the procedure followed in the instant case. Other courts ruling that **Brady** does not require pretrial discovery include: **United States vs. Harris**, 409 F. 2d 77 (4th Cir. 1969); **Archer vs. United States**, 393 F. 2d 124, 126 (5th Cir., 1968); **United States vs. Jordan**, 399 F. 2d 610, 615 (2nd Cir. 1968).

In his argument on the motion to dismiss the defendant contended that the court should search the file of the State to determine if it contained exculpatory information which had not been disclosed. (P.R. p. 141) The court refused. (P.R. p. 142) This ruling is in line with the prevailing authority in this area. In **Dennis vs. United States**, 384 U. S. 855, 875; 16 L. Ed. 2d 973; 86 S. Ct. 1840 (1966), the court stated:

> "In our adversary system, it is enough for judges to judge. The determination of what

> may be useful to the defense can properly and effectively be made only by an advocate. The trial judge's function in this respect is limited to deciding whether a case has been made for production . . ."

In the present case, the attempt by the defendant to have the court review voluminous transcripts of Grand Jury hearings, statements, interviews and reports was denied. The decision of the court was procedurally sound and legally correct.

Question 6: At the conclusion of the direct examination of state witnesses, the State followed the procedure established by Section 54-86 (b) of the Connecticut General Statutes and delivered to the defendant all statements of the witnesses which related to the subject matter as to which the witnesses had testified. As a matter of fact, the order of the court was broader in scope than the requirements of Section 54-86 (b) and included testimony of these witnesses before the Grand Jury. The State complied with this liberal interpretation of its duty to disclose.

Nevertheless, the defendant objected claiming that the State had exculpatory information in its possession which it failed to produce. This baseless claim was made despite the fact that two judges made independent reviews of this question at the request of the defendant and both found nothing improper in the material produced pursuant to the court's pretrial order of production and inspection dated September 23, 1969. (P.R. pp. 13-13)

As a matter of fact, throughout this trial the State acknowleged awareness of its duty pursuant to the decision of the Connecticut Supreme Court in **State vs. Zimnaruk**, 128 Conn. 124, 127 (1941) and the decisions of this court in **Brady vs. State of Maryland, supra** and **Giles vs. Maryland**, 386 U. S. 66, 17 L. Ed. 2d 737, 87 S.

Ct. 793 (1967). (St. App. p. 57a-59a) The record does not show a transgression from the rules established by these cases on the part of the State in this case. It cannot be shown because none exists. The defendant was granted greater discovery rights than the law requires.

Furthermore, the court offered to continue the case a reasonable period of time to afford the defendant a further opportunity to obtain information regarding the State's case, but this offer was never acted upon by the defendant. (St. App. pp. 20a, 106a, 107a) Under such circumstances, it has been held that a defendant cannot later claim prejudice. **United States vs. Calabrese**, (6th Cir.) 1970 421 F. 2d 108, 111-113.

Question 7: On March 11, 1969, Superior Court judge Milton Meyers appointed Justice P. B. O'Sullivan under Section 54-57 of the Connecticut General Statutes to act as a one-man Grand Jury to investigate a stolen goods ring in the Waterbury area.

In June, 1969, the findings of the Grand Jury were completed and, thereafter, the defendant was arrested pursuant to a bench warrant.

The defendant argues that his constitutional rights were violated when he was interviewed by the Grand Jury and that Section 54-47 of the Connecticut General Statutes is unconstitutional on its face and as applied. This statute has withstood many such attacks, one of the more recent of which is the case of **Salvaggio vs. Cotter**, (D. Conn.) 324 F. Supp. 681; affirmed 447 F. 2d 1406. In **Salvaggio**, the court (Claire, J.) stated:

> "The State has always been considered to have the broad inherent power, through grand jury process, to investigate possible criminal conduct, as a basis for formally charging the commission of a crime.

"The federal Constitution too has historically treated the function of a grand jury to be judicial in character. Generally it has been instrusted with the authority to investigate either by direction of the court, the district attorney, or its own body, any suspected commission of crime; and determine whether or not the crime has been committed, and if so, who committed it. This custom and practice has been sanctioned by long usage and general recognition.

"The Constitution itself makes the grand jury a part of the judicial process. It must initiate prosecution for the most important federal crimes. It does so under general instructions from the court to which it is attached and to which, from time to time, it reports its finding. The proceeding before a grand jury constitutes "a judicial inquiry", **Hale vs. Henkel**, 201 U. S. 43, 26 S. Ct. 370, 50 L. Ed. 652 (1906) of the most ancient lineage. **Cobbledick vs. United States**, 309 U. S. 323, 327, 60 S. Ct. 540, 542, 84 L. Ed. 783 (1940); see also, **Hermans vs. United States**, 163 F. 2d 228, 236-237 (6th Cir. 1947).

"Connecticut too has consistently recognized for many years this principle . . . The states have never been required to utilize the grand jury procedure as a condition precedent to a court presentment on a charge involving the commission of serious crime; although each has always been a prerequisite in the federal jurisdiction as provided under the Fifth Amendment to the federal Constitution. Thus, 'due process of law' under the Fourteenth Amendment has never required a grand jury indictment, even in a State's prosecution for a capital crime. **Hurtado vs. California**, 110

> U. S. 516, 4 S. Ct. 111, 28 L. Ed. 232 (1884). A state is thus free to abolish the grand jury or reduce it in size, even to a single number and impart the investigating duties to a member of the judiciary, as it has done in this case. **In re Oliver**, 333 U.S. 257, 68 S. Ct. 499, 92 L. Ed. 682 (1947); **In reMurchison**, 349 U. S. 133, 75 S. Ct. 623, 99 L. Ed. 942 (1955)."

The case of **Puglia vs. Cotter**, (D. Conn.) 333 F. Supp. 940, **aff'd** 450 F. 2d 1362 cert. denied 405 U. S. 1073, 92 S. Ct. 492, 31 L. Ed. 2d 806, is in accord with the **Salvaggio** decision as is the case of **State vs. Hayes**, 127 Conn. 543, 577, 598 (1941).

Question 8: This issue was initially raised in the case of **State vs. Mazzadra**, 28 Conn. Sup. 252, wherein the court (Palmer, J.) stated:

> "The flaw which nullifies the defendant's argument is his claim that only the executive department of government may prosecute criminal offenses. Whatever the constitutions or laws of other states may provide, there is no established or recognized constitutional doctrine or principle in this state that criminal prosecutions must be undertaken by a member or agency of the executive department . . .
>
> "The defendant recognizes the fact that in **Adams vs. Rubinow**, 157 Conn. 150 (1968), a landmark decision in the annals of the constitutional law of this State, Chief Justice King said (p. 163, n. 4): "It perhaps should be pointed out that personnel in the judicial department . . . have from time immemorial been appointed by the judges of the respective courts . . . Thus, the appointment of the personnel in a Constitutional court, including, but not limited to, state's attorneys . . . is not within the power of the General Assembly under our State Constitution . . ."

In concluding its analysis of this question, the **Mazzadra** court observed:

> "The court is of the opinion that the defendant's claim is clearly without merit. However, even if there was a defect in the appointment of the state's attorney for New Haven County, as the defendant contends, the appointee is at least a de facto officer, and his right to perform the duties imposed upon him 'could only be assailed in a direct proceeding such as by writ of quo warranto.' **State vs. Hayes**, 127 Conn. 543, 577. The question is not open to the defendant in this criminal prosecution."

Subsequently the **Mazzadra** decision was cited with approval in the case of **State vs. Luban**, 28 Conn. Sup. 366 (1970). The **Mazzadra, Luban and DiLeo (State vs. DiLeo**, 28 Conn. Sup. 354 (1969) decisions accepted the dictum of **Adams** as an authoritative expression of the constitutional law of the State of Connecticut. The Connecticut Supreme Court endorsed this position by its decision in the present case. (Dec. Def's App. pp. 5b-8b).

This argument is also well answered by the recognized federal procedure in the event of a vacancy in the office of United State's Attorney. Title 28, United States Code, Section 546, provides that the District Court for the District where a vacancy occurs may appoint a United States Attorney until the vacancy is filled by the President. In **United States vs. Solomon,** (D.C.N.Y. 1963) 216 F. Supp. 835, such a procedure was found neither to violate the separation of powers doctrine or to violate the due process clause.

CONCLUSION

For these reasons, the petition for a writ of certiorari to the Supreme Court of the State of Connecticut should be denied.

Respectfully submitted,

The State of Connecticut,

By DENNIS F. GAFFNEY,
Special Assistant State's Attorney.

In The Supreme Court of the United States

OCTOBER TERM

No. 73-238

Paul C. Moynahan, Petitioner

v.

State of Connecticut, Respondent

Appendix To Brief In Opposition To Petition For A Writ of Certiorari To The Supreme Court Of The State Of Connecticut

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Portions of State Supreme Court Record and Appendix submitted in support of:

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1. Questions Sought to be Reviewed, No. 1 ..... 1A

1. With Respect to Questions Sought to be Reviewed, No. 1:

Prior to calling Charles Vernale as a witness the following occurred. (Tr. 801-818):

Mr. Gaffney. The next witness to be called is Mr. Vernale. His name has been mentioned. However, the State does not feel it could vouch for the veracity of this gentleman, and would ask the Court to call him as the Court's witness.

There is some authority for it, your Honor, and I would ask that this take place . . .

The Court. The question before the Court now is whether or not the Court should call Mr. Vernale. I don't believe that that should be done at this time.

It seems to me that you have a right to put Mr. Vernale on the stand and call him as a State's witness, and if he proves to be hostile, then, of course, you have your rights, as you well know.

Mr. Gaffney. Excuse me, your Honor, I am not claiming him as a hostile witness. He had made contradictory statements under oath on various occasions, so, frankly, we cannot vouch for his veracity.

As I understand the Connecticut law, a side calling a particular party must vouch for his veracity. It is the common practice in the Federal Court to call the witness as a Court's witness since he is a necessary witness to the case.

The Court. Is there objection on your part, Mr. Henessey, to having Mr. Vernale called as a Court's witness?

Mr. Hennessey. Well, I would like to say this, your Honor: . . .

I think it would be grossly prejudicial to permit a witness to take the stand and now, in a sense, the burden is being put on the Court to call him.

And then your Honor calls him and he invokes the Fifth Amendment in the presence of the jury. This is extremely prejudicial to us.

The Court. Well, Mr. Carolan is here representing Mr. Vernale . . . But, Mr. Hennessey, you don't have the right to make these claims. You, as counsel for Mr. Moynahan, have no standing to make any claims with reference to whatever rights Mr. Vernale has . . . The State has a right to call anybody. The State has a right to call you. The State has a right to call me as a witness, if necessary.

Mr. Hennessey. I am claiming, your Honor, that if the State calls a witness with any forewarning that this witness is going to invoke the Fifth Amendment in front of the jury, then I would submit that this would be prejudicial.

The Court. The State has a right to call the witness. If Mr. Vernale wants to invoke the Fifth Amendment that is up to Mr. Vernale. Then the Court must make a determination as to whether or not he must answer. But the regular procedure is that the State has a right to call any witness it sees fit . . . Now gentlemen, do you claim that the Court has a right to call this witness?

Mr. Gaffney. Yes, sir.

The Court. I would like to see some authority on that. I am not aware of it.

Mr. Gaffney. Well, if the court please, I think the general authority is that a party must vouch for the

veracity of its witnesses. In other words, we must vouch for the truthfulness of Mr. Vernale if we call him, and frankly, we cannot do that, and we represent that to the Court.

The Court. I, frankly, am unaware of any point of law on this issue, gentlemen.

Mr. Gaffney. May we have the opportunity to see if we could get you some specific authority on it.

I know it is a common practice in the Federal Courts.

The Court. I am not aware of it. I will be very frank, gentlemen. This is something very new to me.

I am not aware of it. Now, if you can show me some authority, I will consider it.

Mr. Gaffney. Thank you, your Honor.

The Court. We will take a short recess, Sheriff.

(Recess.)

(Court resumed - - still in the absence of the jury:)

The Court. You see, Mr. Hennessey, the cases which I have read, of course, I perhaps should have taken a little more time in doing this, but the cases I have read so far all were cases where after the privilege was invoked by the witness, the State persisted in reading into the record in the presence of the jury certain confessions and statements made by the witness which the Courts have said prejudiced the rights of the defendant.

Of course, I do not intend to go that far in this case, but it is my feeling offhand that they have a right to call Mr. Vernale initially to determine what his position is in the presence of the jury, and then from then on the court must make a determination as to how far the State has a right to go.

It would seem to me they should not be restricted in not calling him at all, because they don't know what his position is.

That is the representation that has been made to me; is that correct?

Mr. Gaffney. That is correct, your Honor. I would like the record to be crystal clear on that point, that we frankly do not know what Mr. Vernale is going to testify to.

The Court. You don't even know if he is going to balk as a witness?

Mr. Gaffney. No, I don't know.

The Court. You don't know if he is going to testify friendly?

Mr. Gaffney. That is correct.

The Court. Or be hostile, or is going to invoke his privilege?

Mr. Gaffney. Not through personal conversation with Mr. Vernale but through his attorney, I know what his attorney advised him. His attorney indicated to me he does not know what Mr. Vernale is going to do when he is called as a witness. So the State certainly has no notice of this whatsoever.

Mr. Hennessey. I did want to make it clear that my information is that the advice of Mr. Vernale's attorney to Mr. Vernale will be to invoke his privilege against self-incrimination. And it appears from the fact that the State has expressed this prior concern, is an indication to me that they have at least a belief that he may do this, or he may not.

I think they are representing in all candor they do not know, but he might very well do this.

The Court. Well, the public defender is here to protect Mr. Vernale's rights.

I am going to summon the jury into the courtroom, gentlemen, and ask you to call any witness you intend to call, and then we will proceed from there.

Mr. Hennessey. All right . . .